NO. 89-523

In the Supreme Court of the United States

OCTOBER TERM, 1989

BERMUDA STAR LINE, INC.,
Petitioner

VERSUS

JOHN SPYRIDON MARKOZANNES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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QUESTION PRESENTED

Whether state courts may apply state procedural law in place of the general maritime doctrine of *forum non conveniens* in a suit between foreign litigants on the grounds that the doctrine is unavailable under its procedural rules.

LIST OF PARTIES

The parties to the action are John S. Markozannes and Bermuda Star Line, Inc. The parent concern of Bermuda Star Line, Inc. is Norex, P.L.C, which owns a majority of Bermuda Star's stock. The Steamship Mutual Underwriting Association, Ltd. was originally named as a defendant but never served with process and, accordingly, is not a party to this Petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Petitioner Bermuda Star Line, Inc. respectfully prays that a Writ of Certiorari issue to review the Judgment and opinion of the Supreme Court of the State of Louisiana entered on June 30, 1989.

OPINIONS BELOW

All opinions below are contained in appendices to this Petition. The opinion of court of first instance, the Civil District Court for Orleans Parish in Louisiana, is contained in the transcript from that Court and is reproduced in Appendix A, *infra*, pp. A-1-A-6. Its judgment, dismissing petitioner's exception and maritime defense of *forum non conveniens*, also appears in Appendix A, *infra*, p. A-7. The two opinions of the Louisiana Fourth Circuit Court of Appeal, reversing the district court, are not reported. They are reproduced in Appendix B, *infra*, pp. A-9-A-17. The Louisiana Supreme Court's opinion, reversing the appellate court and reinstating the district court judgment, is reported at 545 So. 2d 537 (La. 1989). It is reproduced in Appendix C, *infra*, pp. A-18-A-19.

JURISDICTIONAL STATEMENT

The judgment of the Louisiana Supreme Court (Appendix C, *infra*, *A-18-A-19*) was entered on June 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1333, commonly known as the "Saving to Suitors" clause, provides in pertinent part as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction saving to suitors in all cases all other remedies to which they are otherwise entitled.

Louisiana Code of Civil Procedure Article 123 provides as follows:

> A. For the convenience of the parties and witnesses, in the interest of justice, a district

court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.

B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in

a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.

C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 U.S.C. § 688 or federal maritime law.

STATEMENT OF THE CASE

FACTUAL BACKGROUND

This action was initiated by respondent John S. Markozannes, a citizen and resident of Greece, in the Civil District Court for Orleans Parish in Louisiana pursuant to the general maritime law and the Jones Act, 46 U.S.C. § 688, *et seq.*, ("Jones Act") against his employer Bermuda Star Line, Inc., the petitioner (hereinafter referred to as "Bermuda Star") (R. 1-5).[1] Respondent's suit alleges that he sustained an illness or injury while serving as a crewmember of the S/S BERMUDA STAR on or about October 27, 1987 (R. 1-5). The S/S BERMUDA STAR, an ocean-going passenger vessel registered under the law of Panama, was bareboat chartered to and operated by Bermuda Star (R. 1, 2, 263, 276, 280). At the time in question, the S/S BERMUDA STAR was on the high seas between Massachusetts and Bermuda (R. 276, 278-81).

Respondent was initially treated and hospitalized in New York before being repatriated to Greece (R. 264). Respondent alleges that some of the potential fact witnesses reside in Greece (R. 272-73, 457). All potential

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[1] The Steamship Mutual Underwriting Association, Ltd., was also named in this suit, but is not a party to this petition as it was never served. The appearance of this concern is not necessary for this Court to render a decision on this Petition.

medical witnesses reside in Greece and New York (R. 272-73, 457). Certain "expert" consultants or witnesses chosen by respondent's counsel reside in Louisiana (R.272).

At all material times, Bermuda Star was a Cayman Islands corporation with its principal place of business in New Jersey (R. 276, 282). A British corporation, Norex P.L.C., owns approximately 59.9 percent of Bermuda Star's outstanding stock (R. 276). Bermuda Star does not have an office or agent for service of process in Louisiana (R. 7).[2]

PROCEDURAL HISTORY

Prior to filing suit, respondent's counsel threatened to attach the S/S BERMUDA STAR when the vessel docked in the Port of New Orleans (R.146-47). Following negotiations between counsel, the parties agreed that Bermuda Star would accept service through its counsel as its informally designated agent for service of process for purposes of this litigation only (R. 87-90). They also agreed that this appontment and acceptance of service was without prejudice to Bermuda Star's maritime defense of *forum non conveniens* (R. 87-90, 143-44, 151). Shortly thereafter respondent filed suit, and Bermuda Star timely asserted its maritime defense of *forum non conveniens*[3] whereby it sought to have this action conditionally dismissed for refiling in Greece or New York (R. 12).

The hearing on the *forum non conveniens* defense

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[2] On May 12, 1989, it was announced that Bermuda Star would be renamed Norex U.S.A. This name change did not change the corporation's base of operations, ownership or status in Louisiana.

[3] In Louisiana state courts, defenses are asserted by a pleading called "exception."

was held on October 21, 1988 before Civil District Court Judge Revius O. Ortique, Jr. (R. 474). Although he acknowledged the flood of maritime cases in Louisiana state courts, Judge Ortique concluded that he had no authority to dismiss the suit on *forum non conveniens* grounds (R. 477-84). Judge Ortique implicitly ruled that once a Louisiana state court obtains personal jurisdiction over a defendant in any foreign seaman's action, then a Louisiana state court was without authority to dismiss the action (R. 482-84). The district court did not clearly rely on any statutory or jurisprudential authority but felt bound to exercise jurisdiction since service was effected in Louisiana (R. 479-84).[4] No written reasons were ever prepared by the district court (R. 307).

Bermuda Star timely applied for supervisory writs to the Louisiana Fourth Circuit Court of Appeal. The appellate court granted Bermuda Star's writ application and unanimously reversed the district court's judgment with the directive that the maritime doctrine of *forum non conveniens* is not waived once personal jurisdiction is established (R. 331). In reaching this holding, the court dismissed respondent's contentions that the maritime doctrine of *forum non conveniens* is merely a procedural device, relying on the Fifth Circuit analysis of the doctrine in *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 305 (5th Cir. 1987), *rev'd on other grounds*, ____ U.S. ____, 108 S. Ct. 1684 (1988) (R. 329-31). The appellate court further rejected respondent's argument that Louisiana Code of Civil Procedure Article 123 prohibits the application of *forum non conveniens* in cases brought pursuant to the Jones Act and

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[4] Although the district judge referred generally to Louisiana decisions on appeals of a prior ruling in his court as controlling, a review of court records and legal research did not reveal any such precedent for the district court's ruling.

general maritime law in Louisiana state courts (R. 329-31).

Upon respondent's application for rehearing, the appellate court affirmed its original order and remanded the case for a decision on the merits of Bermuda Star's defense of *forum non conveniens* (R. 328). In its written reasons on rehearing, the panel unanimously followed the Fifth Circuit's ruling in *Choo* that state courts hearing cases brought pursuant to the Jones Act and the general maritime law must apply the federal doctrine of *forum non conveniens* where the state counterpart is inconsistent with the federal doctrine or, as in Louisiana, where there is no comparable rule (R. 327). The appellate court also held that Louisiana Code of Civil Procedure Article 123, by its terms, does not prohibit the application of the federal maritime doctrine of *forum non conveniens* (R. 328).

On remand, the district court stayed all proceedings pending a decision on respondent's writ application to the Louisiana Supreme Court (R. 448-49). In a *per curiam* opinion, five of the seven Louisiana Supreme Court justices granted respondent's writ application without oral argument, set aside the appellate court's decision and reinstated the judgment of the district court (R. 462-63). The Louisiana Supreme Court held that Louisiana procedural law governs all actions brought in Louisiana state courts, relying on *Missouri v. Mayfield*, 340 U.S. 1, 71 S. Ct. 1 (1950), and that Louisiana Code of Civil Procedure Article 123, which permits dismissal for *forum non conveniens*, is inapplicable to actions brought pursuant to the Jones Act or general maritime law (R. 463).

Bermuda Star seeks to have this Court grant a writ of certriorari to resolve this major conflict between maritime law and state procedure in maritime cases.

ARGUMENT

WHETHER STATE COURTS MAY APPLY STATE PROCEDURAL LAW IN PLACE OF THE GENERAL MARITIME DOCTRINE OF *FORUM NON CONVENIENS* IN A SUIT BETWEEN FOREIGN LITIGANTS ON THE GROUNDS THAT THE DOCTRINE IS UNAVAILABLE UNDER ITS PROCEDURAL RULES.

In broadly holding that state courts may apply local procedural rules to an admiralty dispute between foreign litigants without reference to the general maritime law, the decision of the Supreme Court of Louisiana substantially disrupts the uniformity of the general maritime law by interposing local procedure in place of the general maritime law. The issue presented by this Petition concerns the very heart and soul of the concurrent jurisdiction of state courts in the adjudication of maritime claims.

THE DOCTRINE OF *FORUM NON CONVENIENS* IS AN ESSENTIAL FEATURE OF THE MARITIME LAW THAT SHOULD BE UNIFORMLY APPLIED BY ALL COURTS IN ADMIRALTY CASES.

The doctrine of *forum non conveniens* is a deeply-rooted feature of the admiralty law. *See generally Bickel, The Doctrine of Forum Non Conveniens as Applied in Federal Courts in Matters of Admiralty,* 35 Cornell L. Rev. 12 (1949). For over a century, this Court has recognized that admiralty courts have discretion whether to exercise or decline jurisdiction in a maritime dispute between foreign litigants. *The Belgenland,* 114 U.S. 355, 365-66, 5 S. Ct. 860, 864-66 (1964); *Canada Malting Co. v. Paterson Steamships,* 285 U.S. 418, 420, 52 S. Ct. 413, 414 (1932); *Charter Shipping Co., Ltd. v. Bowring, Jones & Tidy, Ltd.,* 281 U.S. 515, 517-18, 50 S. Ct. 400, 401 (1930); *Mason v.*

Ship Blaireau, 6 U.S. (2 Cranch) 240, 2 L.Ed. 266 (1804). Pursuant to this doctrine, the trial court may entertain or decline its jurisdiction within its discretion, even concerning disputes arising in United States waters. *Canada Malting Co.*, 52 S. Ct. at 414; *see also Exxon v. Chick Kam Choo*, 817 F.2d 307, 321-22 (5th Cir. 1987), rev'd. on other grounds, ____ U.S. ____, 108 S. Ct. 1684 (1988)[5]. As applied by the federal courts, the doctrine of *forum non conveniens* affords a maritime defendant the right to adjudication in a forum which is convenient to the controversy in light of public and private factors affecting the matter in dispute. *Choo*, 817 F.2d at 322; *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1378-81 (5th Cir. 1988); *De Mateos v. Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977); *Pratt v. United Arab Shipping Co.*, 585 F. Supp. 1573 (E.D. La. 1984); *cf.* Bickel, 35 Cornell L. Rev. at 17.[6] This maritime doctrine is an essential feature of admiralty jurisdiction. It embodies the discretionary restraint to the admiralty court to decline jurisdiction and the maritime defendant's right to a convenient forum considering all pertinent policy cir-

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[5] In *Choo*, this Court reversed the decision of the Fifth Circuit which upheld an injunction prohibiting a foreign litigant from proceeding in state court after an earlier determination had been made in a federal court, dismissing the action on grounds of *forum non conveniens*. *108 S. Ct. at 1691.* This Court noted, but did not decide, the defendant's argument that federal maritime determinations of *forum non conveniens* were entitled to "pre-emptive force." The preemption issue was left to be presented to the Texas state courts. In the instant matter, the Louisiana Supreme Court held that the *forum non conveniens* motion could be decided solely by reference to state procedure.

[6] *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 652 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947); *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985), regarding application of the doctrine as incorporated into non-maritime cases. In his dissent to the majority opinion in *Gilbert*, Justice Black specifically noted that this doctrine is a peculiar aspect of admiralty jurisdiction "rooted in the kind of relief which these courts grant and the kinds of problems which they solve." 330 U.S. at 514, 67 S. Ct. at 845.

cumstances. *See generally* Bickel, 35 Cornell L. Rev. at 19-41.

Consistent with the constitutional grant of authority, this Court long ago held and consistently reaffirmed that the general maritime law is to be applied uniformly to cases arising in admiralty. U.S. Const. art. III, § 2, cl. 1; *Panama R. Co. v. Johnson*, 264 U.S. 375, 386-87, 44 S. Ct. 391, 393-94 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160, 40 S. Ct. 438, 440 (1920); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 214-18, 37 S. Ct. 524, 528-30 (1917); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 574-75 (1875). Recognizing the significant impediment to international commerce that would result from an inconsistent body of law, this Court clearly articulated the rule of uniformity in *The Lottawanna*:

> One thing, however, is unquestionable: the Constitution must have referred to a system of law co-extensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the Rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States.

88 U.S. (21 Wall.) at 575.

As an essential feature of the maritime law, the doctrine of *forum non conveniens* should be uniformly applied in all maritime cases in conformity with the decisions of the federal courts interpreting and applying that law. *Choo*, 817 F.2d at 324; *Camejo*, 838 F.2d at 1382; *Hernandez v. Cali. Inc.*, 301 N.Y.S.2d 397, 400-01 (N.Y. App. Div. 1969); *see also Markozannes v. Bermuda Star Line, Inc.*, No. 88-C-2440 (La. App. 4th Cir. 1989) (Appendix B. *infra*

pp. A-11, A-15-16); Couch v. Chevron Int'l Oil Co., 672 S.W.2d 16, 18 (Tex. Ct. App. 1984). State laws or procedures may not be applied when such would work a material prejudice to the "characteristic features" of the general maritime law or would contravene uniformity of that law in some crucial respect.[7] *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 242, 63 S. Ct. 246, 249 (1942); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160, 40 S. Ct. 438, 440 (1920); *Choo*, 817 F.2d at 317; *Camejo*, 838 F.2d at 1382; *Hilaire v. Henderson*, 496 F.2d 973, 980 (8th Cir. 1974); *Branch v. Schumann*, 445 F.2d 175, 178 (5th Cir. 1971).

THE OPINION OF THE LOUISIANA SUPREME COURT DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT.

The decision of the Louisiana Supreme Court creates elemental conflict and disharmony between the general maritime law and local procedural rules in the adjudication of maritime matters. Under the auspices of state procedure, the Louisiana court refused to apply or even consider the maritime doctrine of *forum non conveniens*.

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[7] This is not to say that states courts and state law have no role in the adjudication of admiralty disputes. Under the Judiciary Act of 1789 and its amendments, jurisdiction over maritime matters was permitted in other courts, including the courts of the several states. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243, 63 S. Ct. 246, 249 (1942). Furthermore, in limited areas, particularly involving matters of local concern, state rules may supplement or even expand maritime concepts in absence of applicable maritime principles, *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368 (1955), but no such supplementation is allowed in contravention of an established admiralty principle, *Garrett*, 317 U.S. at 243-44, 63 S. Ct. 249-50, "or where such would substantially . . . alter the rights of either litigant." *Id.*, at 245, 63 S. Ct. at 251. *See also Daughtry v. Diamond M Co.*, 693 F. Supp. 856, 862 (C.D. Cal. 1988); *Celeste v. Prudential-Grace Lines, Inc.*, 358 N.Y.S.2d 729, 731 (N.Y. 1974); *Intagliata v. Merchants Towboat Co., Ltd.*, 159 P.2d 1, 6 (Cal. 1945).

The factual setting here involves a suit by a Greek seaman for an illness board a Panamanian vessel operated by a Cayman Islands corporation and sailing between Massachusetts and Bermuda.[8] In contrast to the uniformity called for by this Court in *The Lottawanna*, the perfunctory opinion of the Louisiana Supreme Court does not even adknowledge the possible application of maritime principles:

> Granted. The judgment of the court of appeal is set aside, and the judgment of the district court is reinstated. Louisiana courts may apply Louisiana procedural law in causes of action brought in Louisiana courts, Missouri v. Mayfield, 340 U.S. 1 (1950). La.C.C.P. art. 123B, which authorizes dismissal on forum non conveniens grounds of a claim predicated solely on a federal statute based on acts or omissions originationg outside the state, is not applicable to causes of action brought under 46 U.S.C. § 688 or the federal maritime law. La.C.C.P. art. 123C.

545 So. 2d 537 (Appendix C, *infra*, p. A-19).

This significant conflict between maritime law and local procedure directly impacts maritime commerce and affects the substantial rights of maritime litigants. Without resolution of this conflict by this Court, maritime

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[8] As reflected in the record, all of the known witnesses and sources of proof center in Greece or in New York (R. 272-73, 457). Respondent was initially treated in New York before being repatriated to Greece (R. 264). The fact witnesses identified by respondent's counsel are citizens and residents of Greece, near Athens, and the medical witnesses are located in either Greece or New York (R. 272-73, 457). The only contact with Louisiana is that the defendant informally appointed an agent to accept service of this particular suit and that plaintiff's counsel has contacted a local economic expert for consultation in connection with this litigation (R. 87-90, 272).

claimants dissatisfied with this maritime doctrine will increasingly "shop" for friendlier forums with procedural or other local laws which obviate the application of the maritime doctrine.[9] Indeed, some claimants, after an adverse ruling by a federal court on a *forum non conveniens* motion, file subsequent actions or activate existing actions in state forums to obtain independent and conflicting resolutions of the same issue. *See, e.g., Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *modified*, 861 F.2d 565 (9th Cir. 1988); *Kassapas v. Arkon Shipping Agency, Inc.*, 485 So. 2d 565 (La. App. 5th Cir.), *writ denied*, 488 So. 2d 203 (La. 1986); *see also Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977); *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So. 2d 281 (La. App. 1st Cir. 1983). In absence of uniform application of this maritime doctrine, the current practice of multiple adjudication and forum shopping in search of favorable state procedural rules will continue — even in the face of an express contrary ruling by the original federal forum. *Id.*

It is difficult to conceive of a greater potential for disruption to international maritime commerce than that presented by multiple adjudications of the same issue without regard to uniform principles and subject to the inconsistsent procedural rules of succesive forums where a ship or an owner might have minimum contact sufficient for personal jurisdiction. In this setting, the comments of Justice Jackson in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921 (1953), regarding choice of law questions are particularly appropriate:

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[9] Due', *The Rights of Foreign Seamen*, 7 The Maritime Lawyer, 265, 279-80 (1982); *cf. In re A/S J. Ludwig Mowinckels Rederi*, 307 N.Y.S.2d 660 (N.Y. 1970).

> [T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage at sea. Hence, courts of this and other commercial nations have generally deferred to a nonnational or international maritime law of impressive maturity and universality.

345 U.S. at 581, 73 S. Ct. at 928.

The decision of the Louisiana Supreme Court will have a grave and real impact upon international commerce if the conflict between maritime law and state procedure is left unresolved by this Court.

THE DECISION OF THE LOUISIANA SUPREME COURT DIRECTLY CONFLICTS WITH THE *CHOO* AND *CAMEJO* DECISIONS OF THE FIFTH CIRCUIT.

The Louisiana Supreme Court decision directly conflicts with the *Choo* and *Camejo* decisions of the United States Court of Appeals for the Fifth Circuit. *Camejo,* 838 F.2d at 1374; *Choo,* 817 F.2d at 307. In *Choo,* the Fifth Circuit comprehensively analyzed the policy considerations affecting the conflict between the state law of Texas and the maritime doctrine of *forum non conveniens* and held that state courts must apply the maritime doctrine in any case brought by a nonresident alien over which federal courts would have admiralty jurisdiction. 817 F.2d at 324. It adhered to this ruling in *Camejo.* 838 F.2d at 1382 (again holding that state courts must apply the maritime rule of *forum non conveniens* in actions by foreign litigants over

which the federal courts would have admiralty jurisdiction). *In dictum*, the *Choo* court severely criticized *Kassapas v. Arkon Shipping Agency, Inc.*, 485 So. 2d 565 (La. App. 5th Cir.), *writ denied*, 488 So. 2d 203 (La. 1986), which, at the time, was the only Louisiana appellate decision refusing to acknowledge the maritime *forum non conveniens* doctrine.[10] 817 F.2d at 324. The Fifth Circuit expressed great concern that state courts would disregard the maritime *forum non conveniens* doctrine in maritime actions brought in their courts. *Id.*

Under the approach of the Louisiana Supreme Court, this issue is resolved solely by reference to state procedure, holding that the state procedure for *forum non conveniens* is not applicable to Jones Act or federal maritime claims. La. Code Civ. Proc. Ann. art. 123 (West Supp. 1989);[11] *see also Kassapas*, 485 So. 2d at 566. Without even considering this Court's rulings regarding uniformity or the analysis of

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[10] The Louisiana Court of Appeal for the Fifth Circuit in *Kassapas*, like the Louisiana Supreme Court in the case at bar, relied solely on this Court's decision in *Mayfield*, 340 U.S. 1, 71 S. Ct. 1 (1950), for the proposition that *forum non conveniens* is a "procedural" device. 485 So. 2d at 566. The *Kassapas* court held that because the doctrine was not at that time recognized in Louisiana procedural law, it could not be applied by the trial court. *Id.* at 566-67. This ruling was rendered prior to the Louisiana legislature's amendment to Article 123 providing for transfers and conditional dismissals pursuant to *forum non conveniens*.

[11] An interpretaion of the Louisiana procedural rule is not material to a resolution of this dispute. Counsel for Markozannes has argued below that Article 123 constitutes an express prohibition against the application of *forum non conveniens* (R. 244). The Fourth Circuit Court of Appeal, however, held that the article does not attempt to address the applicability of *forum non conveniens* in cases involving maritime disputes. *See* Appendix B, *infra*, pp. A-11, A-16. Whether the Louisiana procedural rule prohibits application of the maritime doctrine or is simply silent on the issue, the maritime doctrine, as enunciated by this Court and applied uniformly throughout the federal system, should be applicable to maritime disputes heard by state courts in the exercise of concurrent jurisdiction. *See Choo*, 817 F.2d at 324.

the Fifth Circuit in *Choo*, the Louisiana Supreme Court relied on the inapposite opinion of *Missouri v. Mayfield*, 341 U.S. 1, 71 S. Ct. 1 (1950). This Court decided *Mayfield*, a FELA case, shortly after the *forum non conveniens* doctrine was applied by this Court in a non-maritime setting. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947). The *Mayfield* opinion did not involve maritime law or issues of uniformity and, thus, is not precedent for a state court to disregard the maritime doctrine in admiralty cases. *Choo*, 817 F.2d at 324 n. 18.

The Louisiana decision does not consider maritime law despite full briefing of the issue of uniformity by petitioner, respondent and *amicus curiae*. Despite this silence, the doctrine of *forum non conveniens* cannot be avoided as simply a procedural device inapplicable to admiralty claims filed in state court. The uniformity of the maritime law is not circumscribed by generic notions of substance and procedure. Uniformity applies to all areas affecting the substantial rights of the parties, even when such may conflict with the procedural rules usually applicable in state courts. *Garrett*, 63 S. Ct. 251; *accord Daughtry*, 693 F. Supp. 856; *Celeste, 358 N.Y.S.2d 729; and Hernandez*, 301 N.Y.S.2d 397.[12] The Louisiana decision stands in stark contrast to the express holding of the Fifth Circuit in *Choo* and *Camejo*, and petitioner respectfully prays for this Court to resolve this significant conflict.

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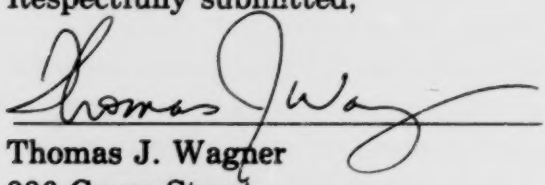
[12] *See also Neely v. Hollywood, Inc.*, 530 So. 2d 1116, 1122 (La. 1988)(noting the controlling effect of maritime law on state courts to protect the "substantial rights of the parties" concerning a dispute of a seaman's release); *Huff v. Compass Navigation*, 522 So. 2d 641, 644 (La. App. 4th Cir. 1988) (applying the federal rule for review on appeal rather than the Louisiana procedure).

CONCLUSION

The conflict between the maritime doctrine of *forum non conveniens* and state law presents an important federal question that warrants resolution by the Supreme Court. Further, the decision below is in direct conflict with the Fifth Circuit decisions in *Choo* and *Camejo* concerning the uniform application of this doctrine to maritime cases. For these reasons, petitioner respectfully prays for a writ of certiorari to review the decision pursuant to Supreme Court Rules 17.1(a) and 17.1(b).

Respectfully submitted,



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WAGNER & BAGOT

APPENDIX A

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

JOHN SPYRIDON MARKOZANNES

VERSUS NO. 88-8624

BERMUDA STAR LINE, INC., ET AL CIVIL ACTION

DIVISION "H"

Testimony and Notes of Evidence held in the above-entitled cause, in Open Court before THE HONORABLE REVIUS O. ORTIQUE, JR., Judge presiding in Division "H" on FRIDAY, the 21st day of OCTOBER of 1988.

Reported By:

SHANNON D. SMITH.
Official Court Reporter

VERIFIED

APPEARANCES

John Caskey
REPRESENTING PLAINTIFF

Thomas Wagner
REPRESENTING DEFENDANT

PROCEEDINGS

THE COURT:

Alright, this is case number 88-08624 John S. Markozannes versus Bermuda Star Line, Inc.

Make your appearances for the record, please.

MR. WAGNER:

Your Honor, Thomas Wagner for the defendant and excepter.

MR. CASKEY:

May it please the Court, John Caskey representing the plaintiff.

THE COURT:

And your exception, Sir?

MR. WAGNER:

Yes, Your Honor, on behalf of the defendant, Bermuda Star Line, we're asking the Court to engage a maritime doctrine, forum non conveniens that we have briefed in a couple of briefs before Your Honor. Our point is fairly simple but it does take some explaining. This is an action for personal injuries, action brought by the Greek seaman for a stroke or illness he sustained aboard a Romanian [*sic*, "Panamanian"] vessel on the highseas while traveling from Bermuda to Boston, Massachusetts. The vessel is owned by the Cayman Island Corporation which has operations in New Jersey. It is our position, we're asking the Court to conditionally dismiss this matter for it to

be brought ina more appropriate and more convenient forum. The doctrine of forum non conveniens is one that has been recognized for years and is an integral part of the maritime doctrine. This Court as a state court has full authority to consider and apply all maritime rights and remedies. The issue of whether or not the Court can grant what the defendant seeks here isn't resolved simply by demonstrating this request as a procedural request, substantive request, the issue is determined by Your Honor taking a look at the remedy and determining whether or not it involves any maritime rights or to be a part of the maritime rights. For example the state courts here constantly apply maritime rules for seaman and for maritime claimants and when they do so, maritime standards --

THE COURT:

Well, you admit that we have done it over and over again.

MR. WAGNER:

What do you mean by that?

THE COURT:

I mean that the Louisiana Courts have accepted jurisdiction and have gone ahead, prior to these maritime cases and as a matter of fact we now have a flood of maritime cases coming in here and we have got no way to keep them out.

Let me state to you, counselor, because I'm convinced that I've got to overrule your exception. In a situation where the accident occurred in the North Sea, the ship was registered in London and therefore was not a single individual aboard

the ship at the time of the accident where there would be any connection with Louisiana. The purser, however, lived and resided in Metairie, and unfortunately I can't put my hand on that case, but the Court in that case, I said, look, you've got to find some, and the ship was registered as a Norwegian ship, you've got to try some other places before you can come in here. The Court of Appeals, Supreme Court both said to me, do you have any connexity what so ever with Orleans Parish, Louisiana, let the matter come in.

MR. WAGNER:

I have two responses and two of them, the first I do not challenge this Court's authority or jurisdiction over the case. You have the authority to hear the case, but I submit that your Honor further has the authority and the right with that discretionary jurisdiction to indicate that this case should be tried somewhere else and to conditionally dismiss it for trial and the reason I do is--

THE COURT:

I don't even need to hear that. That is the same argument that they made before where they said, look, judge, force them to go try it in London or try it in Norway or try it in this place. It goes to the Court of Appeals and they definitely, positively said that you can't do that.

MR. WAGNER:

But since then we have the U. S. Supreme Court's decision in the Crew (SP. PHO.) case, Your Honor, where the Court reversed the Fifth Circuit granting of an injunction by a Federal Court against the State Court and it indicated that the issue of forum non conveniens was to

be decided. So, the U.S. Supreme Court says to the Fifth Circuit, the Court of Appeals, stay off of this issue. The State Court has the right and the authority to consider forum non conveniens and decide for itself whether or not to hear that and that is since Your Honor's decision within Louisiana, that you mentioned. So you do have the authority and I submit one other thing, there is no purser here in Louisiana--

THE COURT:

Hold your point. What is the connexity between Louisiana and your case?

MR. CASKEY:

Agent for service of process in Orleans Parish--

THE COURT:

How are you going to get away from this?

MR. WAGNER:

That allows personal injury [*sic*, "jurisdiction"]--that does now empower the Court, does not wipe out Your Honor's authority to weigh, they could be sued anywhere. It does not take away Your Honor's authority and power to weigh what is the venue, what is the appropriate forum for this matter to be litigated.

THE COURT:

I just waited [*sic*, "weighed"], your motion, your exception of forum non conveniens and improper venue are denied. Bring me a judgment to that effect--no point in us going back and forth, counselor, you made it clear. I refer you to, what is that man's name. . Mr. Dewey.

(OFF RECORD DISCUSSION)

* * * *

CERTIFICATE

I, SHANNON D. SMITH, do hereby certify that the foregoing PROCEEDINGS to be a true and correct copy to the best of my knowledge and understanding.

/s/ Shannon D. Smith

SHANNON D. SMITH, CSR.

OFFICIAL COURT REPORTER

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 88-8624 DIVISION "H" DOCKET NO. (4)

* * * * * * * * * * * * * * *

JOHN SPYRIDON MARKOZANNES
VERSUS
BERMUDA STAR-LINE, INC.

FILED:_____ DY. CLERK: _____

* *

JUDGMENT ON EXCEPTION

Defendant's Exception of Venue and Motion to Dismiss Based on Forum Non Conveniens came on for hearing on the 21st day of October, 1988.

Present for mover: Mr. Thomas J. Wagner, Wagner & Bagot, Suite 250 - C&R Building, New Orleans, Louisiana, 70130;

Present for plaintiff: Mr. C. John Caskey, Attorney at Law, 628 North Boulevard, Suite 200, Baton Rouge, Louisiana, 70802.

Having weighed the evidence and considered the arguments of counsel, the law and evidence being in favor thereof:

The Exception of Venue and Motion to Dismiss on Forum Non Conveniens are DENIED.

New Orleans, Louisiana, this 24th day of Oct., 1988.

/s/ illegible

JUDGE, CIVIL DISTRICT COURT

PLEASE SERVE COUNSEL

APPENDIX B

JOHN SPYRIDON MARKZANNES	¶	NO. 88-C-2440
VERSUS	¶	COURT OF APPEAL
BERMUDA STAR LINE, INC.	¶	FOURTH CIRCUIT
ET AL	¶	STATE OF
	¶	LOUISIANA

¶¶¶¶¶¶¶¶¶¶¶

IN RE:	BERMUDA STAR LINE, INC. ET AL
APPLYING FOR:	SUPERVISORY WRITS
DIRECTED TO:	HONORABLE REVIUS O. ORTIQUE, JR., JUDGE, CIVIL DISTRICT COURT, PARISH OF ORLEANS, DIVISION "H", NO. 88-8624

WRIT GRANTED

Plaintiff, a citizen and resident of Greece, filed suit in Civil District Court against his employer, a Cayman Islands Corporation, with its base of operations in New Jersey and no office or agent for service of process in Louisiana, and its insurer. The plaintiff sought maintenance and cure and damages for an illness or injury he sustained aboard the S.S. Bermuda Star, a Panamanian vessel, bareboat chartered to and operated by the defendant. The injury occurred while the vessel was on the high seas between Boston and Bermuda. The plaintiff was hospitalized and treated in New York before being repatriated to Greece.

Before filing suit, the plaintiff's counsel announced he intended to have the Bermuda Star seized when it docked in New Orleans to secure jurisdiction here. In response, the defense agreed to accept service here and not to contest

personal jurisdiction. The defense then filed an exception of improper venue and a motion to dismiss based on forum non conveniens which were denied. The defendant filed this writ seeking this court's supervisory jurisdiction to review those rulings December 8, 1988. The relator announced at that time it wanted to supplement the record with the transcript of the hearing on the motions. That transcript has not yet been received by this court. However, it appears that the issues can be addressed without the transcript.

STATE LAW OR FEDERAL LAW?

In *Exxon Corp v. Chick Kam Choo,* 817 F.2d 305, 324 (5th Cir. 1987) the U.S. Fifth Circuit held:

> Under the federal uniformity doctrine state courts must apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdicion [*sic*]. State law inconsistent with that doctrine cannot be applied in a maritime case. Accord *Couch v. Chevron International Oil Co.,* 672 S.W. 2d 16 (Tex.App.-Houston [14th Dist.] 1984 *writ ref'd* n.r.e); but *cf. Couch v. Chevron International Co.,* 682 S.W. 2d 534 (Tex.1984); *contra Kassapas,* 485 So.2d 567.

See also *In Re Air Crash Disaster Near New Orleans, La,* 821 F.2d 1145 (5th Cir. 1987). The respondant [*sic*] argues the applicability of C.C.P. art. 123, citing *Kassapas v. Arkon Shipping Agency,* Inc., 485 So. 2d 656 (La. 5th Cir. 1986) *writ. den.,* 488 So. 2d 203, *U.S. cert. den.,* 107 S.Ct. 422 (1986), for the proposition that forum non conveniens is a procedural, rather than a substantive, law and that state court was declared unequivocally "wrong" in *Choo.*

Moreover, C.C.P. art. 123 by its own terms is inapplicable to claims brought pursuant to the Jones Act and federal maritime law. C.C.P. art. 123(c). Thus, since this is a case brought before state court by a foreign citizen over which federal courts have admiralty jurisdiction, the trial court must apply the forum non conveniens rule of general maritime law. *Choo.*

DOES WAIVER OF LACK OF PERSONAL JURISDICTION EXCEPTION RENDER INAPPLICABLE FORUM NON CONVENIENS DOCTRINE?

The relator states that the trial court found that the relator could not argue forum non conveniens after agreeing not to contest jurisdiction.

The doctrine of forum non conveniens presupposes that jurisdiction and venue are correct in the suit. Indeed, the doctrine can "never apply if there is absence of jurisdiction or mistake of venue". *Gulf Oil Corporation v. Gilbert,* 330 U.S. 501, 503, 67 S.Ct. 839, 841 (1947).

As such, consenting to jurisdiction does not prevent a litigant from arguing forum non conveniens. Indeed, the litigant could not argue the doctrine if jurisdiction did not exist.

Accordingly, the judgment of the trial court dated October 24, 1988 dismissing relator's exceptions is hereby reversed. This matter is remanded to the trial court with the directive that a forum non conveniens argument is not waived by waving jurisdictional arguments. Thus the trial court should bear [*sic*, "hear"] argument on this issue and rule on the merits of the forum non conveniens exception.

New Orleans, Louisiana, this 20th day of March, 1989.

/s/ RJK*
JUDGE ROBERT J. KLEES

/s/ JG
JUDGE JIM GARRISON

/s/ William H. Byrnes, III
JUDGE WILLIAM H. BYRNES, III

A TRUE COPY

New Orleans MAR 20 1989
/s/ Illegible Clerk
COURT OF APPEAL FOURTH CIRCUIT

JOHN SPYRIDON MARKZANNES	¶	NO. 88-C-2440
VERSUS	¶	COURT OF APPEAL
BERMUDA STAR LINE, INC.	¶	FOURTH CIRCUIT
ET AL	¶	STATE OF
	¶	LOUISIANA

¶¶¶¶¶¶¶¶¶¶¶

ON APPLICATION FOR REHEARING

The trial court ruled that since the defendant agreed to accept service of process in Orleans Parish, it was prevented from arguing forum non conveniens. This court reversed the trial court, and remanded the case with the instruction that a forum non conveniens agreement is not waived by waiving jurisdictional arguments. This court on March 20, 1989 ordered the trial court to rule on the merits of the forum non conveniens exception. The plaintiff now seeks a rehearing arguing: 1) This court's reliance on *Exxon Corporation v. Chick Kam Choo,* 817 F.2d 305 (Fifth Cir.1987) was incorrect because that case was overruled and 2) This court misinterpreted C.C.P. 123.

We consider rehearing on this Writ under Rule 2-18.7, Uniform rules, Courts of Appeal.

CHICK KAM CHOO

The applicant states *Chick Kam Choo,* supra, was overruled by the U.S. Supreme Court, ____ U.S. ____, 108 S.Ct.1684 (1988). In that opinion the Supreme Court interpreted the Anti-Injunction Act, 28 U.S.C.A. Sec. 2283 and its "relitigation" exception which permits a federal court to issue an injunction "to protect or effectuate its judgments." The U.S. Fifth Circuit in its opinion affirmed

a Federal District Court ruling which issued a broad injunction, prohibiting litigation in Texas state court. The plaintiff had originally filed suit in federal court asserting claims under the Jones Act, DOHSA, general maritime law and Texas Wrongful Death statutes. Federal district court dismissed the Jones [*sic*, "Jones Act"], DOHSA, and general maritime claims on summary judgment, and the rest of the case (Texas Wrongful Death Action) on forum non conveniens grounds. The Fifth Circuit affirmed. The plaintiff then filed this suit in Texas state court on all of the originally asserted grounds but later dismissed all claims except the Texas state law claim and a Singapore law claim. The defendants then filed in federal court for the broad injunction which was granted on the basis of prohibited relitigation. The U.S. Supreme Court reversed the granting of the injunction and remanded for entry of a more narrowly tailored order, stating "Of course, the fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue." The Court ordered the District Court to decide whether it was appropriate to enter an injunction. The Court found:

> [6] The contention that an independent state forum non conveniens determination is preempted by federal maritime law, however, does little to help respondents unless that pre-emption question was itself actually litigated and decided by the District Court. Since respondents concede that it was not, Tr. of Oral Arg. 32, the relitigation exception cannot apply. As we have previously recognized, "a federal court does not have inherent power to ignore the limitations of 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, even when the interference is unmistakably clear." *Atlantic Coast Line,* 398 U.S.,

> at 294, 90 S.Ct. at 1747. See also *Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511, 75 S.Ct. 452, 99 L.Ed. 600 (1955). Rather, when a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court.
>
> This is the course respondents must follow with respect to the Singapore law claim. It may be that respondents' reading of the pre-emptive force of federal maritime forum non conveniens determinations is correct. This is a question we need not reach and on which we express no opinion. We simply hold that respondents must present their pre-emption argument to the Texas state courts, which are presumed competent to resolve federal issues. *Cf. Pennzoil Co. v. Texaco, Inc.*, 481 U.S. at ____, *Clothing Workers, supra*, at 518, 75 S.Ct. at 456-57. Accordingly, insofar as the District Court enjoined the state courts from considering petitioner's Singapore law claim, the injunction exceeded the restrictions of the Anti-Injunction Act.
>
> Id. at 1691.

By so ruling, it appears the the Supreme Court remanded the case to federal District Court for a determination of whether a more narrowly drafted injunction was proper, keeping in mind that the Texas state courts must rule on the forum non conveniens issue. The holding does not reverse the rule of law cited by the Fifth Circuit and relied on by this court, that is, the forum non conveniens rule of the general maritime law controls; inconsistent state law cannot be applied. (overruling *Kassapas* argued by the plaintiff but declared "wrong" by the Fifth Circuit, 817 F.2d at 324). On the contrary, the opinion supports this court's ruling: the Louisiana district court should make a

forum non forum non conveniens determination based on federal maritime law, which determination the state court is presumed competent to resolve.

INTERPRETATION OF C.C.P. ARTICLE 123

The applicant attacks this court's statement that: "[A]rt. 123 by its own terms is inapplicable to claims brought pursuant to the Jones Act and federal maritime law." C.C.P.art.123 (C). C.C.P.art.123 (C) provides: "The provisions of Paragraph (B) shall not apply to claims brought pursuant to 46 USC Sec. 688 or federal maritime law." Paragraph $(B)_1$ provides that a suit against a non-resident plaintiff based solely on a federal statute and based on acts or omission occurring outside of Louisiana may be dismissed without prejudice if the forum is shown to be inconvenient. Such a case brought by a resident plaintiff may not be dismissed. As such, paragraph (B) provides state substantive law to be applied in cases asserting federal causes of action. Paragraph (C) "by its own terms" renders that provision inapplicable to cases brought pursuant to the Jones Act and federal maritime law. The legislature has not "prohibited the application of forum non conveniens in state court" as argued by the defense. It has rendered *state* forum non conveniens doctrine inapplicable. Federal forum non conveniens doctrine, as noted by the U.S. Fifth Circuit in *Chick Kam Choo* and this court on the first hearing on this writ application, is applicable.

The plaintiff refers to a recommendation of the Louisiana Civil Law Committee to repeal section (C). Recommendations of that committee do not change articles promulgated by the legislature, which articles this court is bound to follow.

Accordingly our original order of March 20, 1989 remains unchanged.

New Orleans, Louisiana, this 19th day of April, 1989.

/s/ RJK
JUDGE ROBERT J. KLEES

/s/ JG
JUDGE JIM GARRISON

/s/ WHB
JUDGE WILLIAM H. BYRNES, III

A TRUE COPY

NEW ORLEANS APR 19 1989

/s/ Illegible Clerk
COURT OF APPEAL FOURTH CIRCUIT

APPENDIX C

John Spyridon MARKZANNES [*sic*]

v.

BERMUDA STAR LINE, INC. et al.

No. 89-CC-1144.

Supreme Court of Louisiana.

June 30, 1989.

Writ of certiorari was sought to review unpublished decision of the Court of Appeal which disagreed with the Civil District Court, Parish of Orleans. The Supreme Court held that forum non conveniens statute, which authorizes dismissal of claim predicated solely on federal statute and based on act or omission originating outside state, is not applicable to causes of action under Jones Act or federal maritime law.

Writ granted.

Calogero and Dennis, JJ., would grant writ and docket case for argument.

1. Action 17

Louisiana court may apply Louisiana procedural law in causes of action brought in Louisiana courts.

2. Admiralty 5(2)

Courts 28

Forum non conveniens statute, which authorizes

dismissal of claim predicated solely on federal statute and based on act or omission originating outside state, is not applicable to causes of action under Jones Act or federal maritime law. Jones Act, 46 U.S.C.A.App. § 688; LSA-C.C.P. art. 123, subds. B. C.

PER CURIAM.

[1,2] Granted. The judgment of the court of appeal is set aside, and the judgment of the district court is reinstated. Louisiana courts may apply Louisiana procedural law in causes of action brought in Louisiana courts. *Missouri v. Mayfield*, 340 U.S. 1, 71 S.Ct. 1, 95 L.Ed. 3 (1950). La.C.C.P. art. 123 B, which authorizes dismissal on forum non conveniens grounds of a claim predicated solely on a federal statute based on acts or omissions originating outside the state, is not applicable to causes of action brought under 46 U.S.C. App. § 688 or the federal maritime law. La.C.C.P. art. 123 C.

CALOGERO and DENNIS, JJ., would grant the writ and docket for argument.

AFFIDAVIT OF SERVICE

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority duly commissioned and qualified in the aforesaid state and parish, came and appeared:

THOMAS J. WAGNER

who, after being sworn by me, did depose and say: that he is the counsel of record for petitioner Bermuda Star Line, Inc., and that three copies of this Petition were served on respondent John S. Markozannes through his attorneys of record delineated below by first-class mail, postage prepaid on this 21 day of September, 1989.

C. John Caskey
628 North Boulevard, Suite 200
Baton Rouge, Louisiana 70802

Paul H. Due'
Due', Smith & Caballero
8201 Jefferson Highway
Baton Rouge, Louisiana 70809

Charles Wm. Roberts
1626 Applewood
Baton Rouge, Louisiana 70808

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336 Camp Street
Suite 250 - C & R Building
New Orleans, Louisiana 70130
Telephone: (504) 525-2141
Counsel of Record for Petitioner

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 27 DAY OF
September, 1989.

NOTARY PUBLIC
My commission expires: At Death

No. 89-523

In The

Supreme Court of the United States

October Term, 1989

BERMUDA STAR LINE, INC.,

Petitioner,

versus

JOHN SPYRIDON MARKOZANNES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

C. JOHN CASKEY
Counsel of Record
628 North Boulevard
Suite 200
Baton Rouge, LA 70802
Telephone: 504/343-9850

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Does an interlocutory Order by a State Court denying a *forum non conveniens* dismissal of a maritime case constitute a final judgment or decree within the jurisdictional scope of 28 U.S.C. sec. 1257 for purposes of a review by this Court?

Is a State Court able to apply its own rule with respect to *forum non conveniens* in a Jones Act and a general maritime claim brought pursuant to the "savings to suitors" clause contained in 28 U.S.C. sec. 1233, as it could if it were hearing a claim under the Federal Employers' Liability Act?

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

May It Please The Court:

CORRECTIONS TO STATEMENT OF THE CASE

Undersigned counsel respectfully takes issue with material omissions from the Statement of the Case made by counsel for Petitioner. At the outset of litigation, Petitioner *stipulated* that it was amenable to jurisdiction *in personam* in Orleans Parish, Louisiana. Moreover, Petitioner *stipulated* that its "base of operations" is in Teaneck, New Jersey. Unlike the typical maritime case involving a seaman of foreign nationality, Respondent was hired directly by the New Jersey-based Petitioner, and his letter of engagement (i.e., employment contract)

contains no foreign litigation clause whatsoever. The Petitioner cruise line operates cruises to the Caribbean and Mexico from the Port of New Orleans during the winter cruising season, principally utilizing the cruise vessels S/S QUEEN OF BERMUDA and S/S BERMUDA STAR. On the "off" season, Petitioner's vessel S/S BERMUDA STAR operates a cruise service from the Northeast United States to Bermuda. Respondent sustained a personal injury on one such domestic cruise. Petitioner and its cruise ship S/S BERMUDA STAR in particular have been subjects of multiple personal injury cases in State and Federal Courts in New Orleans over the years. In this case, having stipulated to personal jurisdiction and a New Jersey base of operations, Petitioner would have been precluded from obtaining a *forum non conveniens* dismissal of this case in favor of a foreign forum even had the case been brought in Federal Court.[1] Petitioner's real objective was to effect a "change of venue" to New York near its base of operations by means of a *forum non conveniens* dismissal. While Petitioner's position was arguable, it presents a quite atypical factual and procedural scenario. In Federal Court, an argument that a case ought be dismissed on ground of *forum non conveniens* in preference to an alternative American forum has been procedurally inappropriate since 28 U.S.C. sec. 1404(a) was enacted following *Gulf Oil Corp. vs. Gilbert*, 330 U.S. 501, 67 S.Ct. 839 (1947).

---

[1] *Hellenic Lines, Ltd. vs. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731 (1970).

SUMMARY OF ARGUMENT

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. sec. 1257 despite the fact that a *denial* of a *forum non conveniens* dismissal in a maritime case is patently an interlocutory order by State or Federal criteria. 28 U.S.C. sec. 1257 authorizes a review by this Court of "[f]inal judgments or decrees" rendered by the Louisiana Supreme Court, and Respondent respectfully submits that the Louisiana Supreme Court's reinstatement of the Trial Court's interlocutory order dismissing Petitioner's *forum non conveniens* defense does not rise to the status of a final judgment or decree.

The principle of uniformity is no different in general maritime or Jones Act litigation than it is in Federal Employers' Liability Act litigation. In both instances, the general rule is that the substantive Federal law must be followed by the State Court hearing the matter under the Savings to Suitors Statute, but in matters of procedure the State Court is able to follow its own statutes and requirements. While it is often difficult to classify a particular issue as entirely substantive versus procedural, nevertheless this Court has previously definitively ruled that *forum non conveniens* is not a part of the Federal substantive FELA remedy, with the result that a State Court is free to apply its own rule with respect to that defense. The same rationale ought to be applied to the instant Jones Act and unseaworthiness case, and the Petition for Certiorari accordingly ought to be denied.

ARGUMENT

It would be most extraordinary for this Court to review an interlocutory order of a State Supreme Court reinstating a Trial Court's *denial* of a defense. Certainly under Federal procedural guidelines, a majority of the Federal Courts of Appeals have held that an order denying a motion to dismiss on the ground of *forum non conveniens* is not immediately appealable, and this Court has recently so held. *Wilfried Van Cauwenberghe vs. Baird*, 486 U.S. ___, 108 S.Ct. 1945 (1988). Similarly, Respondent doubts that the denial of a *forum non conveniens* defense rises to the status of a "final judgment or decree" contemplated by the review grant relied upon by Petitioner in 28 U.S.C. sec. 1257. With respect, Respondent suggests that this Court is without the cited statutory authority to review the interlocutory order issued by the Louisiana Supreme Court.

Although uniformity is the rallying cry of Petitioner, the effective result of Petitioner's *forum non conveniens* defense would have been the same had Petitioner been favored with a Federal forum in addressing the defense on the merits. The concept of jurisdiction in Louisiana and all State Courts is considerably more narrow than the constitutional grant in favor of courts of the United States in maritime cases. *A fortiori*, there is characteristically less frequent opportunity for the defense of *forum non conveniens* to be raised in State Court because the defense technically assumes valid jurisdiction and venue.

In the case at bar, Petitioner stipulated to valid *in personam* jurisdiction by the Louisiana State Court, and moreover stipulated to the fact that its base of operations

is in the State of New Jersey. Not only are Petitioner's cruise vessels frequent visitors to the Port of New Orleans, but the Port of New Orleans is additionally the departure and termination point for cruises during the high winter season. Significantly, Petitioner has been a frequent litigator in State and Federal Court in New Orleans over the years in personal injury cases. It is perhaps less than a statement of advocacy to suggest that most Federal and State Courts would have been inclined to dismiss Petitioner's *forum non conveniens* argument on the merits. *Hellenic Lines, Ltd. vs. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731 (1970).

Thus, with the foregoing factual scenario offering Petitioner a remote chance of prevailing on the *forum non conveniens* issue at best, Petitioner sought at the outset to characterize its *forum non conveniens* dispute in terms of a matter of monumental importance. Louisiana is patently *not* an "open forum" state and has recently enacted a statute giving its courts the heretofore unrecognized right to dismiss a case on *forum non conveniens* grounds. The statute in question explicitly excepts maritime cases from the scope of *forum non conveniens* dismissals. The Court will note that the Louisiana appellate disagreement between the Fourth Circuit Court of Appeal and the Louisiana Supreme Court in large measure dealt with interpretation of that recently enacted statute, with the Louisiana Supreme Court definitively stating that the *forum non conveniens* statute did not contemplate maritime cases.

However, this is not the first time that Louisiana procedural law in the area of *forum non conveniens* and maritime cases has come to the attention of this Court.

Petitioner fails to note for the Court that a United States Supreme Court Writ of Certiorari was sought, and denied, in *Kassapas vs. Arkon Shipping Agency, Inc.*, 485 So.2d 565 (La. App. 5th Cir., 1986), writ denied 488 So.2d 203, U.S. cert. denied 107 S.Ct. 422 (1986). In *Kassapas* the Louisiana Court of Appeal for the Fifth Circuit had noted, with concurrence by the Louisiana Supreme Court, that the non-statutory doctrine of *forum non conveniens* was unavailable to maritime litigants in cases brought pursuant to the Savings to Suitors Statute in Louisiana State Court. The underlying rationale of the decision was Louisiana's historic posture as a civilian jurisdiction free of non-statutory procedural remedies and this Court's decision in *Missouri ex rel. Southern Ry Co. vs. Mayfield*, 340 U.S. 1, 71 S.Ct. 1 (1950).

The principle of uniformity relied upon by Petitioner in argument is no different in Jones Act or maritime claims than it is in Federal Employers' Liability Act claims. This was made perfectly clear by this Court in *Garrett vs. Moore-McCormack Company*, 317 U.S. 239, 244, 63 S.Ct. 246, 250 (1942):

> "This Court has specifically held that the Jones Act is to have a uniform application throughout the country unaffected by 'local view of common law rules.' Panama R. Co. v. Johnson, 264 U.S. 375, 392, 44 S.Ct. 391, 396, 68 L.Ed. 748. The Act is based upon and incorporates by reference the Federal Employers' Liability Act, 45 U.S.C.A. sec. 51 et seq., which also requires uniform interpretation. Second Employers Liability Cases (Mondou vs. New York, New Haven & Hartford Railroad Co.), 223 U.S.1, 55 et seq., 32 S.Ct. 169, 177, 56 L.Ed. 327, 38, 38 L.R.A., N.S., 44."

In the case of *Missouri ex rel. Southern Railway Company vs. Mayfield*, 340 U.S. 1, 4, 5, 71 S.Ct. 1, 3 (1950). specifically relied upon by the Louisiana Supreme Court, this Court noted:

> " . . . Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of *forum non conveniens*, a question of State law not open to review here."
>
> * * *
>
> "Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law."

Petitioner mentions *Mayfield* only in passing, with a parenthetical statement suggesting that "issues of uniformity" are present in Jones Act cases that are not apparent in FELA cases. Petitioner's Writ, p. 17. Contrary to this unsupported proposition, the Court in *Norfolk and Western Railway Company vs. Beatty*, 400 F.Supp. 234, 237 (S.D. Ill. 1975), aff'd, 423 U.S. 1009, 96 S.Ct. 439 (1975) held that this Court's *Mayfield* pronouncement was equally applicable to Jones Act cases tried in State Court:

> "Since state rules on *forum non conveniens* govern in F.E.L.A. and Jones Act matters, by analogy state procedure should control here. *Missouri ex rel. Southern Railway vs. Mayfield*, 340 U.S. 1, 71 S.Ct. 1 (1950)."

Since there is no difference in the principle of uniformity between FELA cases tried in State Court on the one hand and Jones Act and general maritime law cases tried

in State Court on the other hand, *Garrett, supra,* and the holding by this Court in *Mayfield, supra,* concerning *forum non conveniens* should be equally applicable and dispositive in the instance case. The Court's attention is drawn to the United States Court of Appeals decision from the Eleventh Circuit in *Sibaja vs. Dow Chemical Company,* 757 F.2d 1215 (CA 11, 1985), cert. denied 106 S.Ct. 347 (1985), in which the Court held that a Federal Court in a diversity case is not obligated by the *Erie* doctrine to apply state *forum non conveniens* law, which the Court characterized as "a rule of venue, not a rule of decision" and a matter "completely apart from any application of . . . substantive law."

This Court has previously recognized that a state is free to adopt remedies and procedures in maritime cases in supplementation of Federal law, even where an admiralty court would not be able to accord a similar remedy. For example, in *Red Cross Line vs. Atlantic Fruit Company,* 264 U.S. 109, 44 S.Ct. 274 (1924). this Court noted that the right of a common-law remedy afforded suitors does not include all means which may be employed to enforce the right or redress the injury involved, and conversely that a state having concurrent jurisdiction is free to adopt such remedies and attach to them such incidents as it sees fit.

In the present case, the Louisiana Supreme Court has continued a history of judicial observations that non-statutory arguments of *forum non conveniens* are not recognized in the purely statutory framework of Louisiana's procedural law. Obviously, the defense of *forum non conveniens* is procedural only and not substantive. A change in courtrooms at least ideally ought not bring about a change of substantive law. *Van Dusen vs. Barrack,* 376 U.S.

612, 639, 84 S.Ct. 805, 821 (1964). Louisiana currently has a statutory procedural device for urging a *forum non conveniens* dismissal of a case. However, Louisiana's Supreme Court has interpreted that statute in this case not to include within its scope Jones Act or maritime cases. It is the prerogative of the State of Louisiana to make procedural distinctions of this nature. *Mayfield, supra.*

Petitioner argues the need for uniformity in the American maritime law, blurring the distinction between the procedural implications and differences in fora contemplated by the Savings to Suitors Statute and *substantive* maritime law. Petitioner assumes a uniformity in *forum non conveniens* procedural law in the Federal Courts and in states other than Louisiana in the maritime context. *Forum non conveniens* is a matter committed to the wide discretion of the Trial Court, and it is commonly conceded that there is absolutely no uniformity even in Federal practice in the area of *forum non conveniens* in maritime and other cases. See Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine,* 133 U.Pa.L.Rev. 781, 831-40 (1985); Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty,* 35 Cornell L. Q. 12 (1949). There is inconsistency in the Federal Circuits currently in cases of *forum non conveniens* involving seamen in such areas as whether or not clear applicability of the Jones Act precludes a *forum non conveniens* dismissal. *Compare, Zipfel vs. Halliburton Co.,* 832 F.2d 1477 (CA9, 1987), cert. denied 108 S.Ct. 2819, as amended 861 F.2d 565 (1988) *with In Re: Air Crash Disaster Near New Orleans, Louisiana,* 821 F.2d 1147, 1164, note 29 (CA5 1987).

Thus, it is doubtful whether in actual practice recognition by Louisiana State Courts of a *forum non conveniens* non-statutory defense would bring about any "uniformity" in application at all, and certainly Petitioner cannot point to a single body of principles which indisputably constitutes the procedural "law" on *forum non conveniens* at present. The case of *Exxon vs. Chick Kam Choo*, ___ U.S. ___, 108 S.Ct. 1684 (1988) does not mandate a reversal of the historical distinction between substantive and procedural law in *forum non conveniens* decisions made heretofore by this Court. Uniformity of decisions and protection of judgments issues addressed in *Exxon* more properly dealt with the finality of decisions on *forum non conveniens* made in the first instance by a Federal Court. These issues are obviously not present in the case at bar.

CONCLUSION

Louisiana's appreciation of the doctrine of *forum non conveniens* is a matter entirely procedural and not open to review in the context of this Case. *Mayfield, supra.* The goal of substantive uniformity necessary for FELA and Jones Act cases brought in State Court is and must be recognized in Louisiana. However, the same procedural freedom that a state has to apply its own understanding of *forum non conveniens* in an FELA case is open to Louisiana logically in a Jones Act case as well. This Court respectfully ought not recognize jurisdiction to review an interlocutory order of the Louisiana Supreme Court reinstating a Trial Court's *denial* of a *forum non conveniens*

defense. Moreover, on the merits certiorari should be denied.

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No. 89-523

In the Supreme Court of the United States

October Term, 1989

BERMUDA STAR LINE, INC.,

Petitioner,

v.

JOHN SPYRIDON MARKOZANNES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

Both amici are composed principally of lawyers whose political and professional concerns center on the rights of injured persons. They try to work with Congress, the state legislatures, and the courts to insure consistency and continuity in the law affecting the rights of injured persons, including injured seamen. Their interest in the present case is persuading the Court to approach the narrow procedural point presented here informed by two fundamental propositions, both well articulated by Professor Alexander Bickel in his article, *The Doctrine of Forum Non Conveniens As Applied In The Federal Courts in Matters of Admiralty: An Exercise In Uncontrolled Discretion*, 35 Corn.L.Q. 12 (1949). "The courts in

a very real sense consider seamen to be their wards and the objects of their protection." (p. 20) "[It] follows from the existence of jurisdiction in the first place, that a case will be retained whenever it is not perfectly clear that plaintiff can recover elsewhere if the facts he alleges are true." (p. 28)

ARGUMENT

Louisiana has decided to keep its courts open for Jones Act cases, provided there is jurisdiction.[1] In *Mis-*

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[1] *Forum non conveniens* in its modern guise allows a court with acknowledged and uncontested jurisdiction over a case to refuse (as a matter of discretion) to hear it, on the ground that trying the case would be too inconvenient either to the court or to the defendant. See generally D. Robertson, *Forum Non Conveniens in America and England*, 103 L.Q. Rev. 398 (1987). This "doctrine" gives trial judges a very broad discretion to dismiss cases on the amorphous "inconvenience" basis. It was invented by Anglo-American judges. See *id.* at 411-12 & n. 104; Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U.Pa.L.Rev. 781, 796-98 (1985). It has no counterpart in any civilian jurisdiction (103 L.Q.Rev. at 426 & n. 197) and is nowhere codified.

In its procedural law and history Louisiana is fully civilian. Louisiana has no tradition of discretion to decline jurisdiction, and no concept of judicial discretion unfettered to a procedural code. Its procedural system is fully codified. See H.G. McMahon, *A Short History of Louisiana Civil Procedure*, Vol. 1 of West's LSA Civil Procedure LXV—LXXXI, at pp. LXXIX-LXXX (1960). The realization that Louisiana's civil procedure system is fully codified was at the heart of *Kassapas v. Arkon Shipping Agency, Inc.*, 485 So.2d 565 (La.App.5th Cir.), *writ ref.*, 488 So.2d 203 (La.1986), *cert. den.*, 479 U.S. 940, 107 S.Ct. 422 (1986). The *Kassapas* holding is clear and unequivocal: There is no such doctrine as *forum non conveniens* in the law of Louisiana. 485 So.2d at 566-67.

After the *Kassapas* decision the Louisiana legislature amended Code of Civil Procedure art. 123 to add a limited form of the *forum non conveniens* doctrine to Louisiana law. (Before the amendment

souri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1, 71 S.Ct. 1 (1950), this Court held that states are free to keep their courts open for FELA cases:

> "According to its own notions of procedural policy, a State may reject, as it may accept, the [*forum non conveniens*] doctrine for all causes of action begun in its courts."
>
> 340 U.S. at 3.

Inasmuch as the Jones Act "is based upon and incorporates by reference the [FELA],"[2] the decision in *Mayfield* ought to be dispositive here.

C.C.P. art. 123 dealt solely with transferring cases from one Louisiana forum to another.) Act 818 of 1988 enacted the following provisions:

> "B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state *in which a claim or cause of action is predicated solely upon a federal statute* and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state . . . the court may dismiss the suit. . . .
>
> "C. The provisions of Paragraph B *shall not apply to claims brought pursuant to 46 U.S.C. §688 [the Jones Act] or federal maritime law.*" [Italics added.]

There is no ambiguity in the 1988 legislation; it limits *forum non conveniens* dismissal to certain federal statutory claims and expressly excludes Jones Act and general maritime law claims from the reach of the limited *forum non conveniens* doctrine it inaugurates. The present case is a Jones Act and general maritime law case. Thus by the express terms of Paragraph C of C.C.P. art. 123 it is not subject to *forum non conveniens* dismissal.

[2] *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246 (1942).

But petitioner argues for treating Jones Act cases differently from FELA cases because Jones Act cases are part of the admiralty or maritime law. The essence of petitioner's argument is that there exists a substantive doctrine of *forum non conveniens* that (a) "is a deeply-rooted feature of the [federal] admiralty law"[3] and (b) should be imposed on the states on the basis of this Court's "reverse-*Erie*"[4] doctrine of maritime-law preemption.

* * * * *

Both of petitioner's propositions are mistaken. As to the first: Before this Court's decision in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839 (1947), all of the federal-court *forum non conveniens* decisions had been admiralty and equity cases.[5] Thus in a limited sense one could say during that era an admiralty doctrine of *forum non conveniens* did exist. Note, however, that this early admiralty doctrine was widely regarded as unsatisfactory. In the article by Professor Bickel on which petitioners place central reliance, it is said that "the admiralty experience [with *forum non conveniens*] is believed not to have been a happy one."[6] Professor Bickel subtitled his article "An Object Lesson In Uncontrolled Discretion."[7]

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[3] Certiorari Petition at 9.

[4] *Chick Kam Choo v. Exxon Corp.*, 486 U.S. ____ , 108 S.Ct. 1684, 1689 (1988). See also D. Robertson, *Admiralty and Federalism* 195 (1970).

[5] See Justice Black's dissent in *Gilbert*, 330 U.S. at 513-14.

[6] Bickel, *The Doctrine of Forum Non Conveniens As Applied In The Federal Courts In Matters Of Admiralty*, 35 Corn. L.Q. 12, 13 (1949).

[7] Bickel's criticism of the old admiralty doctrine—too much discretion, too unfocused and too uncontrolled—parallels Judge Friendly's criticism of the modern federal doctrine in *Indiscretion About Discretion*, 31 Emory L.J. 747, 748-54 (1982).

After the *Gulf Oil* decision *forum non conveniens* became a general venue doctrine of the federal courts. Whatever particularized admiralty features that may once have existed were subsumed into the general federal-court *forum non conveniens* jurisprudence.[8] Certainly since this Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252 (1981), it has been clear that there is no admiralty *forum non conveniens* doctrine as distinct from the general federal-court *forum non conveniens* doctrine. Indeed, the Fifth Circuit Court of Appeals, en banc, went out of its way in a recent case to hold that an erstwhile feature of *forum non conveniens* practice that had been limited to admiralty cases was supplanted by the *Piper Aircraft* decision.[9]

This Court has never answered the question whether *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), obliges federal diversity courts to follow state *forum non conveniens* law, but the lower federal courts are in substantial agreement that it does not. They have held that the federal *forum non conveniens* doctrine is *procedural* for purposes of the "general rule [of *Erie*] that federal diversity courts 'apply state substantive law and federal procedural law.'"[10] The Fifth Circuit Court of Appeals' en banc decision in *In Re Air Crash Disaster Near*

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[8] See Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J.Mar.L. & Com. 185, 185-86, 189-90, 198-99 (1987).

[9] *In Re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1163 & n. 25 (5th Cir. 1987), vacated and remanded on other grounds *sub nom. Pan American World Airways, Inc. v. Lopez*, — U.S. ——, 109 S.Ct. 1928 (1989).

[10] *In Re Air Crash Disaster*, *supra* note 9, 821 F.2d at 1155.

New Orleans, La., 821 F.2d 1147, 1159 (5th Cir. 1987)[11] spelled it out:

> "[T]he interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important than the disruption of uniformity created by applying federal *forum non conveniens* in diversity cases."

See also *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *cert. den.*, 474 U.S. 948, 106 S.Ct. 347 (1985). The *Sibaja* court also concluded that federal courts are not bound by the state law of *forum non conveniens*, explaining that federal *forum non conveniens* is part of a district court's "inherent power under Article III of the Constitution to control the administration of the litigation before it," analogizing it to "the court's inherent power to punish contempt," and observing that "[t]he Court's interest in controlling its crowded docket also provides a basis for the Court's inherent power to dismiss on grounds of *forum non conveniens*." 757 F.2d at 1218. The *Sibaja* court concluded:

> "The *forum non conveniens* doctrine is a rule of venue, not a rule of decision."
>
> 757 F.2d at 1219.

* * * * *

Turning to *petitioner's second proposition:* The doctrine that holds state courts obliged to follow the federal courts of admiralty on matters of maritime law is generally called the "reverse-*Erie*" doctrine:[12]

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[11] Vacated and remanded on other grounds *sub nom. Pan American World Airways, Inc. v. Lopez*, ____U.S. ____, 109 S.Ct. 1928 (1989).

[12] See text and note 4, *supra*.

> "It has been universally and correctly assumed that state procedural rules govern actions in state courts under the 'saving to suitors' clause—the 'reverse-*Erie*' metaphor captures this assumption perfectly."[13]

We have just seen that federal diversity courts are free under *Erie* to ignore state *forum non conveniens* law (treating it as non-applicable local procedure) in order to exercise their own "inherent powers"; control their own dockets; and assert their own "interests in self-regulation, in administrative independence, and in self-management." This Court's recent decision in *Sun Oil Co. v. Wortman*, 486 U.S. ____ , 108 S.Ct. 2117 (1988), makes it clear that state courts have interests and powers of roughly identical stature and scope. *Sun Oil Co.* held that, even though the Full Faith and Credit and Due Process clauses forbade a state's applying its own substantive law to certain matters in which it had no significant interest, the state's courts were free to apply their own statute of limitations to those very matters:

> "Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that *a State may apply its own procedural rules to actions litigated in its courts.*"[14]
>
> A State's interest in *regulating the work load of its courts* and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations."[15]

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[13] *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 310 (5th Cir. 1987), *rev'd on other grounds*, ____U.S. ____ , 108 S.Ct. 1684 (1988).

[14] 108 S.Ct. at 2122. Emphasis added.

[15] 108 S.Ct. at 2126. Emphasis added.

The premises of the *Sun Oil Co.* decision are clearly antithetical to petitioner's argument. The situations are perfectly parallel: Just as the state court in *Sun Oil Co.* was free to apply its own procedural rules (including statutes of limitations) although constitutionally obliged to follow another system's substantive law, so is the state court in the present case free to apply its own procedural rules (including its own concept of *forum non conveniens*) although constitutionally obliged to follow another system's (admiralty's) substantive law. The *Sun Oil Co.* decision seems dispositive of the present case.

Petitioner would have the Court abandon the settled understanding of "reverse-*Erie*," introduce a doctrine that denigrates the stature and independence of the state courts vis-a-vis the federal courts, and contradict the premises and philosophy of *Sun Oil v. Wortman*—all in the interest of "the uniformity of the general maritime law."[16] But forcing the state courts to adopt the federal *forum non conveniens* doctrine would achieve no meaningful uniformity. It is widely conceded that there is little or no uniformity in the federal courts' reactions to *forum non conveniens* pleas in maritime and other cases. On the contrary, what has resulted is "a crazy quilt of ad hoc, capricious, and inconsistent decisions."[17] The federal *forum non conveniens* jurisprudence has been aptly described as "notoriously complex and uncertain," with no predictability or uniformity at all.[18] It is noteworthy that the Su-

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[16] Petition for Certiorari at 9.

[17] Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U.Pa.L.Rev. 781, 785 (1985).

[18] Currie, *Change of Venue and the Conflict of Laws*, 22 U.Chi.L.Rev. 405, 416 (1955). For similar criticisms of the doctrine,

preme Court of Australia recently refused to adopt a doctrine of broad *forum non conveniens* discretion on the American model, relying in major part on the arguments set forth by American scholars critical of the federal courts' doctrine. *Oceanic Sun Line v. Fay* [1988] 79 A.L.R. 9, 40, 47.[19]

* * * * *

The fact that the federal doctrine of *forum non conveniens* brings no significant uniformity or predictability to the treatment of cases like the present one is ample reason for this Court to decline the invitation to impose that doctrine on the state courts. A closely related reason for declining the invitation is simply that the federal doctrine is not well-enough formulated and defined to be suitable for promulgation as the required law of the land. This Court's "reverse-*Erie*" decisions over the years have not been easy to understand and reconcile in all respects.[20] But one strand seems fairly clear: State law has normally been deferred to when the federal maritime law has not developed a clearly defined rule. It is believed that

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see Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 748-54 (1982); Robertson, Forum Non Conveniens in America and England, 103 L.Q. Rev. 398 (1987); Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J.Mar.L. & Com. 185 (1987).

[19] Note also that a handful of very recent decisions arguably indicates that some of the lower federal courts are turning away from the broad jurisdiction-declining discretion that has been at the heart of federal *forum non conveniens* during its recent heyday. See *Lony v. E.I. Dupont*, 886 F.2d 628 (3d Cir. 1989); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38 (3d Cir. 1988); *Carlenstolpe v. Merck & Co.*, 817 F.2d 33 (2d Cir. 1987).

[20] See G. Gilmore, *Book Review of D. Robertson's Admiralty and Federalism*, 38 U.Chi.L.Rev. 431 (1971).

this consideration explains *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 346 U.S. 310, 75 S.Ct. 368 (1955) (upholding the application of state law to a marine insurance policy), and *Madruga v. Superior Court*, 346 U.S. 556, 74 S.Ct. 298 (1954) (upholding state court jurisdiction over actions to partition ships). The same philosophy reflected in *Wilburn Boat* and *Madruga*—avoiding imposing a generalized solution from on high unless it has been proved out as reasonably sound—argues for denying the present petition for certiorari.

* * * * *

The legitimate aims of maritime-law uniformity in the present context are served by the choice-of-law doctrines set forth in this Court's trilogy of cases dealing with the applicability of the Jones Act and the American general maritime law to foreign seamen.[21] No one doubts that these doctrines—which tell the courts of America whether to apply the remedies afforded by U.S. substantive maritime law in cases brought by foreign seamen—are equally as binding on the state courts as on the federal.[22] Thus if petitioner is right in its claim that allowing respondent to sue on the basis of American law is an unwarrantable disruption of maritime commerce, the state court's application of the controlling choice-of-law doc-

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[21] *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921 (1953); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468 (1959); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731 (1970).

[22] See, e.g., *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So.2d 281, 284-85 (La.App.), *writ ref.*, 440 So.2d 731 (La.1983), *cert. den.*, 465 U.S. 1079 (1984); *Jackson v. S.P. Leasing Corp.*, 774 S.W.2d 673, 678 (Tex.App. 1989).

trines can be expected to avoid such disruption. (In point of fact, however, this Court's decision in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731 (1970), probably means that *any* American court that addressed the choice-of-law features of the present case would conclude that respondent is entitled to go forward on the basis of the Jones Act. In this connection note the *Rhoditis* decision's emphasis on the alien shipowner's base of operations together with the present petitioner's concession that "its principal place of business [is] in New Jersey." Petition for Certiorari at 6. A long time ago Professor Bickel reminded us that it "follows from the existence of jurisdiction in the first place that a case [should] be retained whenever it is not perfectly clear that plaintiff can recover elsewhere if the facts he alleges are true."[23] The federal courts have strayed far from this principle, but it would be harsh indeed to insist that the state courts do likewise.)

* * * * *

Finally, it should be noted that there is almost no authority for the proposition petitioner propounds. Petitioner's authority consists entirely in two panel opinions from the Fifth Circuit Court of Appeals. The more recent one, *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1382 (5th Cir. 1988), is merely a dictum reiteration of the conclusion of the writing judge in the earlier Fifth Circuit panel decision, without comment or analysis. In the earlier case, *Exxon Corp. v. Chick Kam Choo*, 817

[23] Bickel, *The Doctrine of Forum Non Conveniens As Applied In the Federal Courts in Matters of Admiralty: An Object Lesson In Uncontrolled Discretion*, 35 Corn.L.Q. 12, 28 (1949).

F.2d 307 (5th Cir. 1987), Judge Gee wrote an opinion that no other member of the court fully joined. He began by acknowledging the black-letter view of "reverse-*Erie*" as described above:

> "It has been universally and correctly assumed that state procedural rules govern actions in state courts under the 'saving to suitors' clause—the 'reverse-*Erie*' metaphor captures this assumption perfectly." 817 F.2d 319.

Nevertheless Judge Gee went on to conclude that state courts hearing maritime cases are obliged to follow the *forum non conveniens* practices of federal admiralty courts. (In so doing, Judge Gee went far out of his way to declare the Louisiana decision in *Kassapas*, *supra* note 1, to be "wrong." 817 F.2d at 324. This was an unusual operation for a lower-court federal judge to perform on a state-court decision, especially one in which both the state supreme court and this Court had denied certiorari.)

Neither of the other members of the *Chick Kam Choo* panel subscribed to Judge Gee's reasoning. Judge Gee arrived at his conclusion (that federal forum non conveniens practices must be followed by state maritime courts) in the course of upholding a federal-court injunction prohibiting a state court from hearing a maritime case. Judge Reavley dissented from Judge Gee's reasoning and from the decision upholding the injunction: "It is for the Texas court to decide its own forum convenience and to identify the issues subsidiary to that determination." 817 F.2d at 325. Judge Clark agreed that the injunction was proper in the narrow circumstances of the case but, as was recently pointed out by the Ninth Circuit, "he did not concur in Judge Gee's *forum non conveniens* analysis." *Zip-*

fel v. Halliburton Co., 832 F.2d 1477, 1489 (9th Cir. 1987), *cert. den.*, 108 S.Ct. 2819 (U.S. 1988).

In *Chick Kam Choo v. Exxon Corporation*, 486 U.S. ____ , 108 S.Ct. 1684 (1988), this Court reversed Judge Gee's decision upholding the injunction, but did so on narrow grounds that expressly did not reach his *forum non conveniens* reasoning. See 108 S.Ct. at 1691.

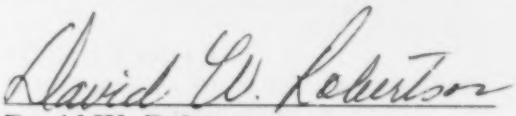
CONCLUSION

There is very sparse lower-court authority for imposing a procedural doctrine like *forum non conveniens* on the state courts and very strong authority looking the other way. This Court's decisions in *Missouri ex rel. Southern R. Co. v. Mayfield* and *Sun Oil Co. v. Wortman* show that state courts are generally free to employ their own *forum non conveniens* and other procedural doctrines in contexts in which the controlling substantive law is federally mandated. The lower federal courts have consistently held that *forum non conveniens* is procedural for purposes of the rule of *Erie R. Co.*; they have justified that conclusion by extolling the federal courts' "interests in self-regulation, administrative independence, and self-management." A decent recognition that state courts have similar interests will characterize *forum non conveniens* as procedural for purposes of the reverse-*Erie* rule as well.

There are strong policy arguments against forcing *forum non conveniens* on the states. It is the kind of amorphous and uncertain doctrine deemed unsuitable for imposition on the states in this Court's *Wilburn Boat* and *Madruga* decisions. Within the federal court system the

federal *forum non conveniens* doctrine does a poor job of protecting the uniformity interests it is urged as furthering. Such interests are in any event protected to some extent by substantive choice-of-law doctrines that bind state courts. For all these reasons the petition for certiorari should be denied.

Respectfully submitted,



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B-9339, 12-89

(4)

NO. 89-523

In the Supreme Court of the United States

OCTOBER TERM, 1989

BERMUDA STAR LINE, INC.,
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VERSUS

JOHN SPYRIDON MARKOZANNES,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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REPLY BRIEF OF PETITIONER

STATEMENT OF THE CASE

The Respondent's brief states that "[a]t the outset of litigation, Petitioner *stipulated* that it was amenable to jurisdiction *in personam* in Orleans Parish, Louisiana." Brief for Respondent at 1. Correctly stated, Petitioner agreed to accept service in New Orleans, Louisiana and agreed not to challenge personal jurisdiction. Both parties specifically agreed that the issues of *forum non conveniens* and proper venue were not waived and would be raised by the Petitioner.[1] These issues were raised as exceptions filed immediately at the outset of litigation (R. 12). Those exceptions were ultimately reviewed by the Louisiana

[1] *See*, Appendix to this reply brief, *infra*, which comprises part of the record of the Civil District Court for the Parish of Orleans, State of Louisiana (R. 143-51).

Supreme Court which held that the admiralty doctrine of *forum non conveniens* was inapplicable and that maritime cases filed in state court were governed by state procedural law (R. 463).

ARGUMENT

JURISDICTION

This Court has clear jurisdiction over this appeal under the authority of 28 U.S.C. § 1257. Respondent challenges jurisdiction on the grounds that the decision of the Louisiana Supreme Court is not a "final" order or decree within the meaning of the statute, citing *Wilfried Van Cauwenberghe v. Biard*, 486 U.S. 517, 108 S. Ct. 1945 (1988). Respondent's position is in error. The argument fails to perceive the distinction between a final order of a state's court of last resort denying a basic federal right (*see, e.g., Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 557-58, 83 S. Ct. 520, 522 (1963); *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 641-42, 96 S. Ct. 1800, 1803 (1976)) and a discretionary decision of a trial judge, denying a dismissal of *forum non conveniens* under the specific facts of an individual case as in *Biard*, 108 S. Ct. at 1953. The Supreme Court patently had jurisdiction over the former but not over the latter.

The *Markozannes* decision below is a final order of Louisiana's highest court that a maritime defendant has no right to the protection of the maritime doctrine of *forum non conveniens* when the action is commenced in Louisiana state courts. This Court has long recognized that decisions of this type are "final" within the meaning of § 1257 even when there remain further proceedings in the lower state courts. *Cox Broadcasting Corp. v. Cohn*, 400 U.S. 469, 476-87, 95 S. Ct. 1029, 1036-42 (1975); *Langdeau*, 371 U.S.

555. As in *Langdeau* and *Cox Broadcasting*, the legal issue is entirely separate and distinct from the merits of Respondent's claims. Those decisions recognize the jurisdiction of the Supreme Court to review decrees of the state's highest courts which finally resolve federal issues particularly where the Court may be precluded from review of an important federal question following the further state proceedings. *Cox Broadcasting*, 400 U.S. at 482-83.

Immediate review of such federal issues is particularly appropriate when action by the Supreme Court might obviate unnecessary, expensive, and time-consuming litigation. *Cox Broadcasting*, 400 U.S. at 478. In *Langdeau*, this Court upheld its jurisdiction to review a state court decision regarding a federal challenge to state venue provisions. The Court recognized that its review of the federal issue (which involved a choice betweeen courts of the same state) could obviate "long and complex litigation which may be for naught if consideration of the preliminary questions of venue is postponed until the conclusion of the proceedings." *Langdeau*, 371 U.S. at 558; *see also*, *Starnes*, 425 U.S. at 639.

Petitioner respectfully submits that the decision below presents such a final order regarding an important federal issue within the jurisdiction of the Supreme Court under 28 U.S.C. § 1257.

MERITS OF CERTIORARI

Petitioner urged in its initial brief that the *Markozannes* ruling decides an important issue of federal law that should be resolved by this Court and that the Louisiana decision directly conflicts with the *Choo* and *Camejo* decisions of the United States Court of Appeals for

the Fifth Circuit.[2] The importance of this issue is to some extent evident from opposition urged by the American Trial Lawyers Association and the Louisiana Trial Lawyers Association. The significance of this issue is further manifest in substantial litigation concerning this hotly contested topic.[3] Nonetheless, neither Respondent nor *Amici Curiae* directly respond to the importance of this federal question.

Without guidance from this Court, the admiralty practice will continue to be plagued with redundant and expensive litigation wherein maritime claimants whose actions are dismissed in federal court under principles of *forum non conveniens* will commence duplicative actions in state courts for the obvious advantage of forcing a maritime defendant to litigate in a patently inconvenient forum without regard to the prior federal ruling or uniform principles of maritime law. Petitioner respectfully urges that guidance by this Court is needed with respect to a maritime defendant's right to be protected from such vexatious and harassing litigation.[4]

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[2] *Exxon v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S. Ct. 1684 (1988); *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988).

[3] *See* discussion in Petitioner's initial brief, pp. 13-15 and the unreported decision of *Torvald Klaveness and Company A/S v. Rosauro Quintero, et al.*, C.A. No. 88-1879 (E.D. La. December 12, 1989), which is in the Appendix, *infra*.

[4] As noted by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 842 (1947), such is the principal objective of this doctrine:

> The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his

Without addressing the issue of whether *certiorari* is warranted, Respondent and *Amici Curiae* argue the merits of the issue, alleging that *forum non conveniens* is merely a procedural matter which should be decided under the authority of state procedural rules, citing *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 71 S. Ct. 1 (1950) and *Sun Oil Co. v. Wortman*, 486 U.S. 717, 108 S. Ct. 2117 (1988). Brief for Respondent at 7-9; Brief for Amicus Curiae at 3, 7-8, 13. However, there is a fundamental difference between the interstate considerations involved in the *Mayfield* and *Wortman* cases and the Constitutional issues and international concerns inherent in the conflict between state law and the general maritime law. U.S. Const. art III, § 2, cl. 1; *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875); *Panama R. Co. v. Hohnson*, 264 U.S. 375, 387, 46 S. Ct. 391, 394 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160, 40 S. Ct. 438, 440 (1920); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 214-18, 37 S. Ct. 524, 528-30 (1917).

The issue in *Mayfield* concerned the potential application of state rules of *forum non conveniens* in the context of a railroad claim under FELA. It did not concern international commerce or conflicts with any uniform law, such as the general maritime law, recognized and protected under our Constitution. *See generally Mayfield* 340 U.S. 1. Likewise, the *Wortman* decision involved the application of the forum state's statute of limitations rather than the statutes of limitations of other states having an interest in the controversy. 108 S. Ct. at 2121. Neither case considered

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(Footnote 4 continued)

> remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.

any issue of international commerce or uniformity or the general maritime law. By contrast to the decision in *Wortman,* the general maritime law manifestly requires uniform application by all courts (state and federal) of maritime statutory limitations and the alternate judicial doctrine of laches rather than state procedural limitations. *Cox v. Roth,* 348 U.S. 207, 75 S. Ct. 242 (1955); *Engel v. Davenport,* 271 U.S. 33, 46 S. Ct. 410 (1926); *see also* 1 M. Norris, *The Law of Maritime Personal Injuries* §124 at 230-32 (3d ed. 1975); 2 M. Norris, *The Law of Seamen* § 30:20 at 393-96 (4th ed. 1985).[5] The Constitutional recognition of the general maritime law compels the application by the state courts of all the critical features of maritime law (substantive or procedural) in precedence over conflicting state law and procedures.

The opposition briefs do not directly challenge the concept of *forum non conveniens* as an integral part of the general maritime law and a basic right of a maritime defendant. The continued vitality of this doctrine has been recognized by this Court, even in non-maritime contexts. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 102 S. Ct. 252 (1981). Therein, this Court noted the long history of this doctrine and its frequent application to federal admiralty actions. *Id.* at 248 n. 13. The *Reyno* court further dismissed opponents' contention[6] that choice-of-law considerations should be dispositive of the federal doctrine of *forum non conveniens.* Citing its admiralty decision of *Canada Malting Co. v. Paterson Steamships, Ltd.,*285 U.S. 413, 52 S. Ct. 413 (1932), the *Reyno* Court specifically held that

---

[5] *See also King v. Alaska S.S. Co.,* 431 F.2d 994 (9th Cir. 1970); *Flowers v. Savannah Machine and Foundary Co.,* 310 F.2d 135 (5th Cir. 1962); *Oroz v. American President Lines, Ltd.,* 259 F.2d 636 (2d Cir. 1958), *cert. denied,* 359 U.S. 908, 79 S. Ct. 584 (1959).

[6] *See* brief for *Amici,* p. 5.

held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." 454 U.S. at 247.

While Petitioner concedes that the doctrine has become applicable to non-maritime cases[7] and provided the basis underlying the statutory motion to transfer within the federal system,[8] the right to a convenient forum nonetheless remains a viable and critical part of a maritime defense. *See, e.g., Exxon v. Chick Kam Choo,* 817 F.2d. 307; *Zipfel v. Halliburton Co.,* 832 F.2d 1477 (9th Cir. 1987), *modified,* 861 F.2d 565 (9th cir. 1988), *cert. denied* ___ U.S. ___, 108 S. Ct. 2819, *reh'g denied,* ___ U.S. ___, 109 S. Ct. 2 (1988). This doctrine remains a strong feature of the admiralty law and a significant right of a maritime defendant to guarantee adjudication of an admiralty claim in a fair and convenient forum.

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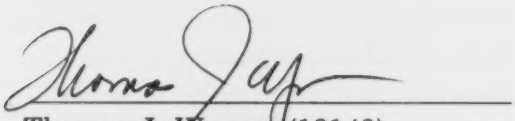
[7] *See generally Reyno,* 454 U.S. 235; *Gilbert,* 330 U.S. 501.

[8] *See* 28 U.S.C. § 1404; Brief for Respondent at 2.

CONCLUSION

Petitioner respectfully prays that this Court grant a writ of certiorari to resolve the conflict between the maritime doctrine of *forum non conveniens* and state procedural law.

Respectfully submitted,



Thomas J. Wagner (13143)
336 Camp Street
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and
WAGNER & BAGOT
Counsel of Record for Petitioner

OF COUNSEL:

Michael D. Martocci
MARTOCCI & BURNS
South Street Seaport
19 Fulton Street, Suite 405
New York, New York 10038
Telephone: (212) 233-4690

WAGNER & BAGOT

AFFIDAVIT OF SERVICE

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority duly commissioned and qualified in the aforesaid state and parish, came and appeared:

THOMAS J. WAGNER

who, after being sworn by me, did depose and say: that he is the counsel of record for Petitioner Bermuda Star Line, Inc., and that three copies of this Petition were served on Respondent John S. Markozannes through his attorneys of record delineated below by first-class mail, postage prepaid on this 11th day of January 1990.

C. John Caskey
628 North Boulevard, Suite 200
Baton rouge, Louisiana 70802

Paul H. Due'
Due', Smith & Caballero
8201 Jefferson Highway
Baton Rouge, Louisiana 70809

Charles Wm. Roberts
1626 Applewood
Baton Rouge, Louisiana 70808

David W. Robertson
727 East 26th Street
Austin, Texas 78705

Thomas J. Wagner
WAGNER & BAGOT
336 Camp Street
Suite 250, C & R Building
New Orleans, Louisiana 70130-2804
Telephone: (504) 525-2141
Counsel of Record for Petitioner

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 4th DAY OF Jan, 1990

NOTARY PUBLIC

My commission expires: _____

MICHAEL D. RILEY
NOTARY PUBLIC
State of Louisiana
My Commission Is Issued For Life

APPENDIX A

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 88-8624 DIVISION "H" DOCKET NO. (4)

JOHN SPYRIDON MARKOZANNES
VERSUS
BERMUDA STAR-LINE, INC.

FILED:_____ _____
DEPUTY CLERK

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personnally came and appeared

THOMAS J. WAGNER

who, being duly sworn by me did depose and say the following:

That he is counsel of record for Bermuda Star Line, Inc., defendant in the captioned matter, and he makes this affidavit in support of defendant's motion to quash oral depositions, convert same to depositions on written question, postpone depositions and/or assess costs.

That on April 28, 1988, counsel was appointed to represent Bermuda Star Line, Inc. and respond to the letter of plaintiff's counsel dated April 27, 1988 and attached

hereto as Exhibit "A". Plaintiff's counsel indicated that he planned to seize the S/S BERMUDA STAR in order secure jurisdiction over the defendant under a petition and writ of attachment. Upon information and belief, the vessel was scheduled to arrive in New Orleans on May 9 or 10, 1988.

That counsel conferred with his principals and thereafter negotiated with plaintiff's counsel and reached an agreement with plaintiff's counsel under which undersigned counsel would be appointed to accept service of the suit of John S. Markozannes. It was specifically agreed that Bermuda Star Line, Inc. would not contest personal jurisdiction but that it would contest the venue of the Louisiana courts as well as the appropriateness of the forum under principles of *forum non conveniens.* In accord with this agreement, undersigned counsel was appointed to accept service of this suit. See Exhibit "B". Undersigned counsel filed exceptions of *forum non conveniens* and improper venue and also filed a stipulation acknowledging personal jurisdiction. These were filed on May 5 and 6, 1988. See Exhibits "C" and "D", attached. The stipulation and exceptions were filed before the vessel's arrival in New Orleans. Furthermore, plaintiff's counsel was clearly agreeable to the defendant asserting defenses of improper venue and *forum non conveniens* as indicated in plaintiff's counsel's proposed stipulation which is attached hereto as Exhibit "E". The perticular stipulation was ultimately not executed by counsel for defendant because it referred to "Suits" in the plural rather than the individual suit of John S. Markozannes. Instead, Exhibit "D" was executed and filed.

That with respect to the proposed discovery, undersigned counsel was not notified in advance that plaintiff intended to schedule any depositions in Greece until the notices were transmitted. Undersigned counsel had

previously requested that plaintiff's counsel provide all medical records and bills so that the maintenance and cure issue could be expedited. No such documents were provided to undersigned counsel proir to the noticing of these depositions. Nevertheless, upon information and belief, defendant has paid in excess of $12,000.00 in medical and transporation expenses directly even though plaintiff's counsel has not submitted same.

That undersigned counsel's schedule conflicts with the depositions noticed in Greece for July 19, 20, 21 and 22, 1988 and that there is no immediate need to take these depositions as such can be expeditiously handled through more economical convenience and less extravagant means.

That the information contained in this affidavit is true and correct to the best of the affidavit's own knowledge, information and belief.

/s/ Thomas J. Wagner
THOMAS J. WAGNER

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 12th DAY
OF JULY, 1988, IN NEW
ORLEANS, LOUISIANA.

/s/ illegible
NOTARY PUBLIC

APPENDIX B

C. JOHN CASKEY
Attorney at Law
North Boulevard
Suite B
Baton Rouge, LA

April 27, 1988

Mr. Charles F. Lozes
Terriberry, Carrol & Yancey
2100 World Trade Center
New Orleans, LA 70130

RE: John Spyrdion Markosannes vs.
Bermuda Star Line, Inc.
Orleans, Civil District Court

Dear Mr. Lozes:

Attached you will please find a draft copy of a Petition and Writ of Attachment which I am filing concurrently in the Orleans Civil District Court. The Petition is largely self-explanatory. The S/S BERMUDA STAR is a passenger ship. In the past, I have had occasion to size passenger ships in which your office appeared as counsel of record. As you know, seizure of a passenger ship can be quits disruptive to operations. As a courtesy to your client, I am giving your office advance notice of this attachment in state court so that possible arrangements can be made for the posting of security. In state court, my requirements for security would be the posting of a $50,000.00 bond with a signed agreement that the security, upon demand, will be increased by the appropriate insurer up to $500,000.00.

As you know, the holding of *Kaspapas vs. Arkon Shipping Agency, Inc.*, 485 So.2d 565 (La. App. 5th Cir. 1986)

prohibits a *forum non conveniens* transfer of a case out of state court in Louisiana to another jurisdiction (or dismissal). This is apparently not a "foreign seaman" case in the sense that plaintiff risks a possible dismissal on grounds of *forum non conveniens* in any event, but inasmuch as Bermuda Star line, Inc., is a New Jersey corporation, there is the distinct possibility that this case could be transferred to New Jersey pursuant to 28 U.S.C. §140(a) should the case be filed in federal court.

I am willing to file this suit in the first instance in federal court without any seizure of the S/S BERMUDA STAR (and no need to post security at all) *if* (1) there is not a coverage question relative to the applicable P & I policy, (2) the P & I Club involved will agree to be made a party defendant in federal court and will make a general appearance, and (3) all defendants agree that they will not bring a motion to dismiss on grounds of *forum non conveniens* in federal court or a motion to transfer to the state of New Jersey pursuant to 28 U.S.C. §140(a). If your client finds the above proposal inappropriate or inconvenient, we can proceed along state court lines. As we both know, Orleans Civil District Court is usually preferable as a jurisdiction from the plaintiff's standpoint, however balanced with this is the inordinate delay that is encountered in waiting for a trial date. It is really irrelevant from the standpoint of my client how we proceed, so I will leave that decision up to you.

Please let me know how we are going to proceed as soon as possible, because I will be in London beginning May 6, 1988, I will have to make arrangements for this attachment well in advance of my departure.

Kindest Regards,

C. John Caskey

cc: George Pavlakis
CJC/tmg

APPENDIX C

BERMUDA STAR LINE, INC. 1088 TEANECK, TEANECK, NEW JERSEY 07888 TELEPHONE (201)837 0400/TELEX 139213

May 3, 1988

Thomas J. Wagner, Esq.
Wagner & Bagot
Suite 250—C & R Building
336 Camp Street
New Orleans, Louisiana 70130-2804

Via Facsimile Transmission

Dear Mr. Wagner:

Concerning our previous discussions, Bermuda Star Line, Inc., hearby confirms its appointment of you as its agent for service of process, summons, complaint and all other papers requiring service in Louisiana in connection with any law suit to be filed on or behalf of John S. Markoannes (Ioannis Markosannes) in connection with any accident, injury and or illness on the SS BERMUDA STAR.

Very truly yours,

BERMUSA STAR LINE, INC.

/s/ Donald L. Caldera
DONALD L. CALDERA
Chairman and Chief Executive Officer

SS CANADA STAR • SS BERMUDA STAR • SS VERACRUZ

APPENDIX D

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 88-8624 DIVISION "H" DOCKET NO. ___

JOHN SPYRIDON MARKOZANNES
VERSUS
BERMUDA STAR-LINE, INC.
THE STEAMSHIP MUTUAL
UNDERWRITING ASSOCOATION, LTD.

FILED: _____ _____
DEPUTY CLERK

EXCEPTIONS OF FORUM NON CONVENIENS AND IMPROPER VENUE

NOW INTO COURT, through undersigned counsel, comes exceptor, Bermuda Star Line, Inc., which acknowledges the appointment of Thomas J. Wagner to accept service of suit papers filed on behalf of John Spyridon Markozannes in this action only, and excepts to this Court's exercise of jurisdiction on the basis of *forum non conveniens* and improper venue.

Respectfully submitted,

/s/ Michael H. Bagot, Jr.

THOMAS J. WAGNER
MICHAEL H. BAGOT, JR.
N. ELEANOR GRAHAM
Suite 250 - C & P. Building
New Orleans, Louisiana
Telephone: (504) 525-2141
and
WAGNER & BAGOT
Attorneys for Defendant
Bermuda Star Line, Inc.

CERTIFICATE

I, the undersigned authority, hereby certify that I have this date forwarded a copy of the above and foregoing pleading to all Counsel involved herein.

This 5th day of May
1988
M. H. Bagot, Jr.

APPENDIX E

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 88-8624 DIVISION "H" DOCKET NO. ___

JOHN SPYRIDON MARKOZANNES
VERSUS
BERMUDA STAR LINE, INC. and
THE STEAMSHIP MUTUAL
UNDERWRITING ASSOCIATION, LTD.

FILED: _____ _____
DEPUTY CLERK

STIPULATION

NOW INTO COURT, through undersigned counsel, come plaintiff, John Spyridon Markozannes, and defendant, Bermuda Star Line, Inc., who agree and stipulate that Bermuda Star Line, Inc. does not and will not challenge the court's jurisdiction over the person of Bermuda Star Line, Inc. in this case.

Plaintiff,
John Spyridon Markozannes

By: /s/ C. John Caskey

C. JOHN CASKEY
732 North Boulevard
Suite B
Baton Rouge, Louisiana 70802
Telephone: (504) 343-9850

Defendant,
Bermuda Star Line, Inc.

By: /s/ M. H. Bagot, Jr.

THOMAS J. WAGNER
MICHAEL H. BAGOT, JR.
N. ELEANOR GRAHAM
WAGNER & BAGOT
Suite 250 - C & R Building
New Orleans, Louisiana
Telephone: (504) 525-2141

CERTIFICATE

I, the undersigned authority, hereby certify that I have this date forwarded a copy of the above and foregoing pleading to all Counsel involved herein.

This 6th day of May
1988
M. H. Bagot, Jr.

APPENDIX F

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 88-8624 DIVISION "H" DOCKET NO. (4)

* * * * * * * * * * * * * * * * * *

JOHN SPYRIDON MARKOZANNES
VERSUS
BERMUDA STAR LINE, INC. and
THE STEAMSHIP MUTUAL
UNDERWRITING ASSOCOATION, LTD.
FILED:_____ DY. CLERK: _____

* *

STIPULATION

NOW INTO COURT, through undersigned counsel, comes Plaintiff John Spyridon Markozannes, and Defendant, Bermuda Star Line, Inc., and hereby stipulate to the following:

By acknowledging that Bermuda Star Line, Inc. has appointed as agent for service of process in suits against it in this State undersigned counsel and by acknowledging that this Court has personal jurisdiction over Bermuda Star Line, Inc. by virtue of said appointment, Bermuda Star Line, Inc. does not thereby waive its right to assert exceptions of improper venue or its right to raise *forum non conveniens* defenses to this action.

C. JOHN CASKEY
Attorney for Plaintiff

By: /s/ C. John Caskey

C. JOHN CASKEY
Attorney at Law
732 North Boulevard, Suite B
Baton Rouge, Louisiana 70802
Telephone: (504) 343-9850

THOMAS J. WAGNER
Attorney for Defendant, Bermuda Star Line, Inc.

BY: _____

THOMAS J. WAGNER
Wagner & Bagot
336 Camp Street
New Orleans, LA 70130
Telephone: (504) 523-1587

APPENDIX G

MINUTE ENTRY
McNAMARA, J.
DECEMBER 12, 1989

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

TORVALD KLAVENESS AND COMPANY A/S	*	CIVIL ACTION
VERSUS	*	NO. 88-1879
ROSAURO QUINTERO, ET AL	*	SECTION "D" (2)

Before the court are the Cross-Motions of Plaintiff, Torvald Klaveness and Company A/S, and Defendants, Rosauro Quintero and Frank Sloan, for Summary Judgment. These Motions were heard before the court on Wednesday, November 29, 1989.

Having considered the memoranda of counsel and the applicable law, the court now rules on the issues presented in these Cross-Motions for Summary Judgment.

1. Plaintiff asks this court to enjoin the current state court proceedings in Civil District Court on the basis of this court's Minute Entry of September 29, 1989 in Civil Action No. 86-4241 (hereinafter "Minute Entry"). The court's Minute Entry ruled that Quintero's action against Klaveness should be dismissed on the basis of federal *forum non conveniens.* In making that analysis, this court also determined that Philippine law should be applied in

this matter according to the *Lauritzen-Rhoditis* test. Plaintiff argues that this court's choice-of-law decision "necessarily precludes every cause of action stated in either the original federal suit or the subsequent state court action." Plaintiff's Memorandum, p. 3.

It is well settled that a federal court may only enjoin state court proceedings if the injunction fits within the exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283 (1982). Section 2283 provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Plaintiff argues that an injunction would fit within the third exception ("to protect or effectuate its judgments"), which is called the relitigation exception.

The Supreme Court case *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684 (1988), delineates the parameters of the relitigation exception to the Anti-Injunction Act. In *Chick Kam Choo,* a Singapore resident was accidentally killed in Singapore while performing repair work on a ship owned by one of the defendants. The decedent's wife sued in federal district court alleging causes of action under the general federal maritime law and the Texas Wrongful Death Statutes. The district court granted defendants summary judgment on the maritime law claim, concluding that choice-of-law principles required that Singapore law, and not the maritime law of the United States, should apply. The court also dismissed the case on federal *forum non conveniens* grounds, provided that the defendants submit to the Singapore's court's jurisdiction. Plaintiff then filed suit in Texas state court under Texas law and Singapore law, but the federal court enjoined the plaintiff from pursing any claims relating to her husband's

judicata "'makes a final, valid judgment conclusive on the parties, and *those in privity with them*, as to all matters, fact and law, that were or should have been adjudicated in the proceedings.'" *Id.* at 131, quoting 1B Moore's Federal Practice, para. O.4405[1] at 624 (emphasis added). *Res judicata* is applicable only when the cause of action in the state court is "identical to the cause of action" in the federal court. *Id.* The decotrine of collateral estoppel also applies in determining the scope of an injunction. The requirements for collateral estoppel "are in a sense less stringent than those of *res judicata* since in the former, relitigation of any particular legal or factual issue between two parties (or their privies) which was necessarily litigated and actually decided in the first suit is barred." *Id.*

The *Nix* decision makes it clear that an injunction to prevent relitigation of an issue that has been decided in a federal court can apply to the actual parties or *their privies* in state court. *See also, Samuel C. Ennis & Co., Inc. v. Woodman Realty Co.*, 542 F.2d 45 (7th Cir. 1976), *cert. denied.* 429 U.S. 1096 (1977). In the instant action, this court's Minute Entry did not apply to the Barwa Interests since they were not parties to Civil Action No. 86-4241. However, the Barwa Interests are clearly privies to Klaveness. The current proceeding in state court involves the same occurrence, the same plaintiff and the same issues, and the Barwa Interests stand in the identical position as Klaveness in regards to Quintero. As such, this court holds that an injunction preventing the state court from relitigating the issue of choice-of-law should extend to the Barwa Interests. Accordingly, Plaintiff's Motion for Permanent Injunction should be and is GRANTED to the extent that this court will issue an injunction enjoining the Louisiana Civil District Court from reconsidering this court's decision on choice-of-law. In all other respects, however, Plaintiff's Motion for Permanent Injunction

should be and is DENIED.

2. Plaintiff seeks an award of attorney's fees and expenses from the Defendants, arguing that their actions in state court "were unwarranted under the law and for improper purposes." Plaintiff's Memorandum, p. 6. Even if Defendants' actions in state court were for improper purposes, sanctions under Fed.R.Civ.P. 11 are not applicable to actions taken in a state court. Accordingly, Plaintiff's request for attorney's fees and expenses should be and is DENIED.

3. Defendants contend that all demands brought on behalf of the Barwa Interests should be dismissed for lack of standing under Fed.R.Civ.P. 17 since those corporations were not parties to Civil Action No. 86-4241. Since Plaintiff has amended its petition to bring in the Barwa Interests into this action, Defendants' Motion in this regard is MOOT.

Judgment will be entered accordingly.

* * * *